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IN THE

# Supreme Court of the United States

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OCTOBER TERM, A. D., 1918

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CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY, AND WABASH  
RAILWAY COMPANY,

*Petitioners,*

vs.

DES MOINES UNION RAILWAY COM-  
PANY, F. M. HUBBELL, F. C. HUBBELL  
AND F. M. HUBBELL & SON,

*Respondents.*

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No. 819

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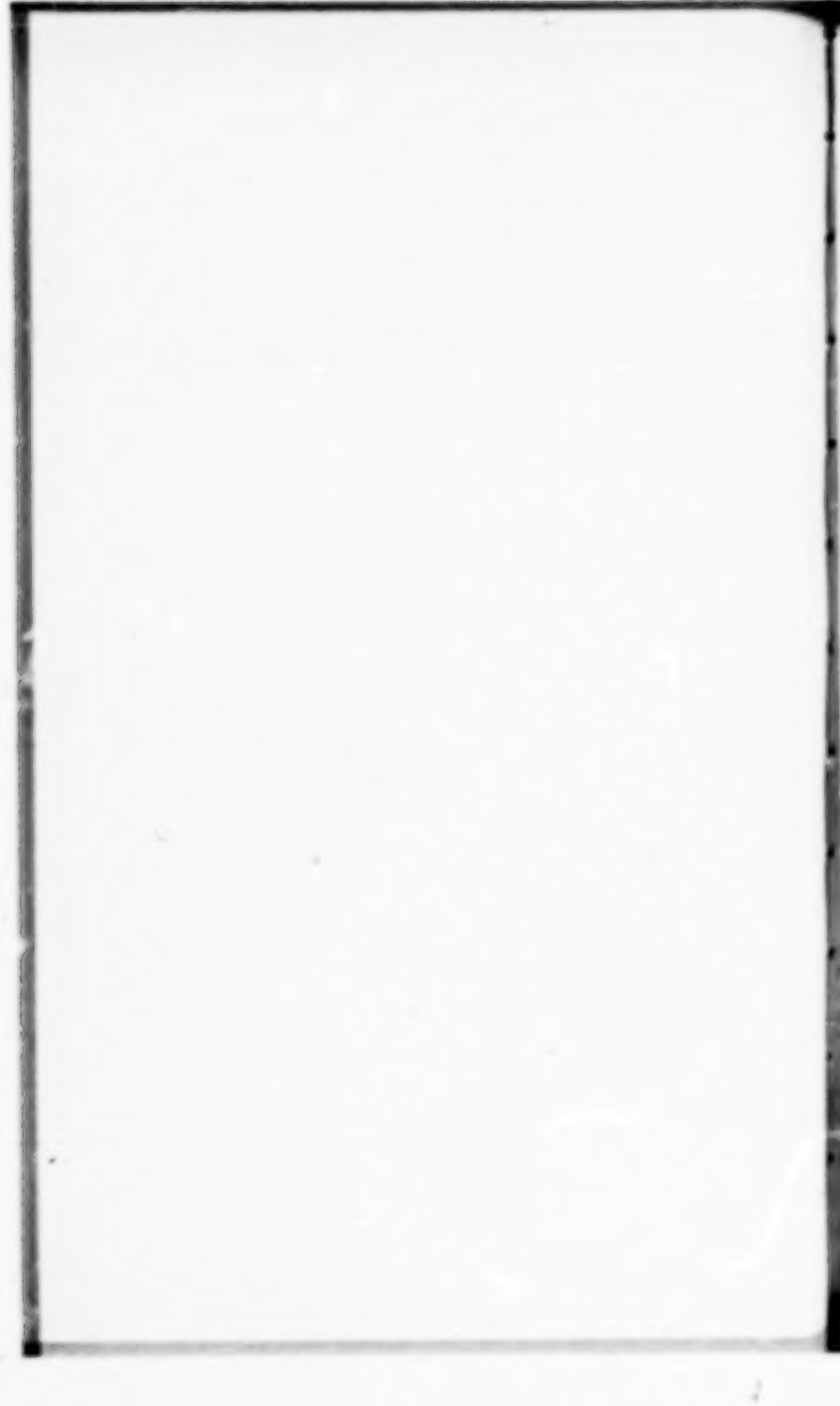
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**BRIEF IN OPPOSITION TO PETITION FOR  
CERTIORARI.**

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F. W. LEHMANN AND  
J. L. PARRISH,

*Of Counsel or Respondents.*

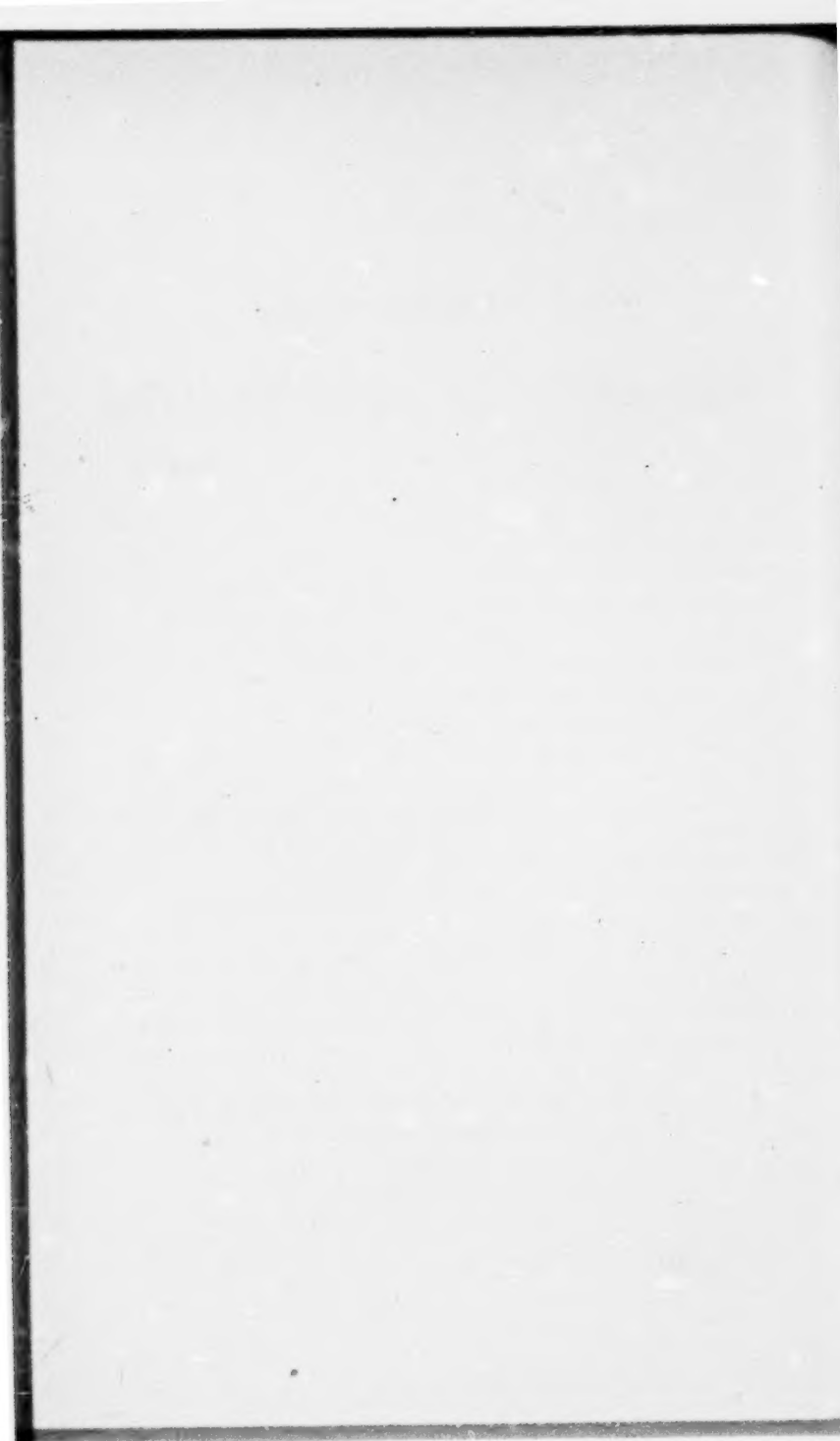




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AND F. M. HUBBELL & SON,

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## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

### The Parties.

The petitioners, the Chicago, Milwaukee and St. Paul Railway Company and the Wabash Railway Com-

pany, have each of them a line of railroad terminating at Des Moines, Iowa.

The respondent, the Des Moines Union Railway Company, owns and operates the railway terminal system which is used by the Milwaukee and Wabash and some other railway companies at Des Moines.

The respondents, F. M. Hubbell and F. C. Hubbell, are officers of the Des Moines Union Railway Company and have been for thirty years or more.

The respondents, F. M. Hubbell and Son are stockholders in the Des Moines Union Railway Company.

### **The Subject of Contention.**

The nucleus of the property of the Terminal Company was acquired about 1882 and prior thereto by the Milwaukee and Wabash Companies, or rather by their predecessors, also railroad companies, and owning and operating the same lines of railroad now owned and operated by the Milwaukee and Wabash.

These predecessor companies organized or caused to be organized, the Des Moines Union Railway Company, with authorized capital stock of one million dollars and with authority for the issuance of bonds.

By deeds absolute and unqualified in form, the predecessors in title of the petitioners, conveyed this terminal property to the corporation they had created and as consideration for such conveyance they took four hundred thousand dollars of the bonds of this terminal company and all of its capital stock.

Other property was later and from time to time acquired by the company and paid for by its bonds or by proceeds of the sale of bonds.

The capital stock of the Des Moines Union was taken

by the companies which created it, one-fourth to each of the two original companies which are predecessors of the Milwaukee, and one-half to the predecessor of the Wabash.

The amount of this capital stock was fixed in the first instance at one million of dollars, increased then to two million dollars, and finally left at two million as being authorized, but only four hundred thousand as having been paid for and as so adjusted and issued one-half of the stock was assigned to the Wabash predecessor and the other half to the Milwaukee predecessors.

Of this stock F. M. Hubbell and Son have acquired twenty-five hundred shares by purchase from the predecessors of the Milwaukee and the Wabash, and the stock holding in the Terminal Company now is and has been for more than twenty years as follows:

The Wabash.....	500 shares.
The Milwaukee.....	1,000 shares.
F. M. Hubbell & Son.....	2,500 shares

### **The Question in the Case**

Is as to the title by which the Terminal Company holds its property.

It got that property from the predecessors of the petitioners and they had unquestioned and unqualified good title. It got it by deeds which by their terms conveyed to the Terminal Company the same unquestioned and unqualified good title which the grantors had. And it paid full rounded measure of value therefor in its stocks and bonds.

Nonetheless, the petitioners contend that at some

time in the course of dealing between the parties, there was in some way, some sort of an easement in this property reserved to the grantors, an easement which gave to them the entire beneficial use, right and interest in the property in perpetuity, and that the Terminal Company by the deed absolute to it and for which it gave full value, got only the barren legal title.

Under this contention the Terminal Company must operate this property always for the use and behoof of the petitioning railway companies, for the bare cost of operation so far as they are concerned, with no allowance on account of the value of the property employed, and moreover, all rents, incomes, earnings and profits, the fruit of the use of the property by or for third parties, must go to these same petitioning railway companies.

The shares of stock of the Terminal Company are thus rendered entirely worthless, which the railway companies can well afford since they absorb everything as owners of the dominant estate. F. M. Hubbell & Son, however, lose everything.

### **The Decision of the Court of Appeals**

Was against this contention of the railway companies, and held that the Des Moines Union Railway Company was the owner of its property, that it had in fact gotten what it had bought and paid for, and that the predecessors of the petitioners had parted with what they had sold and received the price for. The Wabash and the Milwaukee seek by their petition a review of this decision.

### **The Beginning of the Enterprise.**

From our point of view the petition for certiorari herein is not entirely accurate in its presentation of the facts of the case, and we therefore think it appropriate to make a statement in chronological order of the acts and contracts involved, and to let these, as far as possible, speak for themselves in the very words of the record.

Three companies, predecessors of the petitioners, prior to 1882 determined on building lines of railroad to Des Moines, one of them, now the Wabash, from the south, and two of them, now the Milwaukee, from the north and northwest. They acquired land in Des Moines to be used by them for terminal purposes jointly, the purchase being made in part directly by the railroad companies and in part by James F. How and General G. M. Dodge, as trustees.

### **The Contract of January 2nd, 1882.**

The arrangement between the companies, the Des Moines & St. Louis (predecessor of the Wabash), and the Des Moines Northwestern and St. Louis, Des Moines and Northern (predecessors of the Milwaukee), was expressed in a writing between these original companies and Col. How and General Dodge of date, January 2nd, 1882 (Rec., Vol. 2, p. 411).

It provided:

#### **"FIRST.**

The companies above named are engaged in the construction of railways converging at the City of Des Moines and have heretofore agreed upon the purchase, construction and maintenance, at their

joint expense for terminal facilities in the City of Des Moines to be held and used in common as hereinafter provided.

## SECOND.

In pursuance of said agreement, various purchases have been made of real property in the City of Des Moines in the name of James F. How, individually; James F. How, trustee, and Grenville M. Dodge, and certain additional property has been appropriated by the Des Moines and St. Louis Railway Company, and the construction of buildings and other improvements upon said premises has been begun.

## THIRD.

It is mutually agreed by the parties above named that the expense incurred by the purchases and improvements above mentioned and such others as may be hereafter made, shall be borne in the proportion of one-half by the Des Moines and St. Louis Railway Company and one-quarter by each of the other two companies above named. It is understood that a Depot Company may be organized and may take permanent charge of the property upon the terms herein set forth and that said company may issue and deliver to the companies, parties hereto, its mortgage bonds to the amount of their respective portions of the cost of the said purchases and improvements.

## FOURTH.

The title to said property shall be and remain in a trustee to be named by agreement of said companies, but subject to the joint use and occupation of all of said Railway Companies upon the terms herein described.



**FIFTH.**

The individual signers hereby declare said purchases to have been made in their names upon the trusts above referred to, and agree to quit claim and convey the same to said trustee upon demand and reimbursement.

**SIXTH.**

The Des Moines and St. Louis Company shall at all times be charged with the police control, supervision and maintenance of said property, and the expense thereof shall be apportioned between it and the said other two companies, the apportionment to be determined by the use thereof which they shall respectively make as evidenced by the wheelage; payment of the sum required to be made monthly to the Des Moines and St. Louis Railway Company, within ten days after rendition of an account stated.

**SEVENTH.**

The control of said property by the Des Moines and St. Louis Railway Company shall not extend to a determination of the character and extent of improvements to be now or hereafter put upon the same, but differences between the parties under this head shall be settled by arbitration."

The remaining provisions of the contract need not be here considered.

It is obvious that under this contract the Railroad Companies were the absolute owners of this property with right to use it or dispose of it as they might agree among themselves, subject only to the right of Col. How and General Dodge to be reimbursed for what they had paid for lands purchased by them.

The contract does not provide, as stated on page 4 of the petition, that the property constituting its subject matter "should be held in perpetuity subject to the joint use and occupation of all said railway companies."

No trustee was ever named by the parties under paragraph four of the contract.

Operation under and according to the terms of this contract, each company doing its own switching over the tracks with simply police control, etc., by the Des Moines and St. Louis, proved to be unsatisfactory.

### **Organization of the Des Moines Union Railway Company.**

December 10th, 1884, the Des Moines Union Railway Company was organized under the laws of Iowa relating to corporations for pecuniary profit. This was done at the instance of the railroad companies, parties to the agreement of January 2nd, 1882, and was contemplated by paragraph three of that agreement.

The agreement of January 2nd, 1882, is recited and set out in full in the Articles of Incorporation and then it is further recited (Vol. 2, p. 419):

"Whereas, each of said Railway Companies and said parties has expended large sums of money in purchasing and improving the property aforesaid, and in the construction of suitable buildings for the use of said companies, and

Whereas, it was provided in the contract aforesaid that a Depot Company might be organized to take permanent charge of the property, and it was the understanding of the parties that such company might acquire, operate and maintain said

property in such manner as best to serve the interest of the parties hereto.

Now, therefore, for the purposes aforesaid, as well as for those hereinafter expressed, the undersigned hereby associate themselves in a body corporate, and adopt the following Articles of Incorporation."

The following among the articles of incorporation are pertinent to be considered:

## ARTICLE 2.

The general nature of the business to be transacted shall be the construction, ownership and operation of a railway in, around and about the City of Des Moines, Iowa, including the construction, ownership and use of depots, freight houses, railway shops, repair shops, stock-yards and whatever else may be useful and convenient for the operation of railways at the terminal point of Des Moines, Ia., as well as the transfer of cars from the line or depot of one railway to another, or from the various manufactories, warehouses, storehouses, or elevators to each other or to any of the railways or depots thereof, now constructed or to be hereafter constructed, in or around said City of Des Moines, and such corporation shall possess all the powers conferred upon corporations for pecuniary profit by chapter 1 of Title IX of the Code, and the amendments thereto. All the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882, by and between the Des Moines and St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Jas. F. How, trustee, and Grenville M. Dodge. The said company shall have the right to lease or otherwise

dispose of the use of any part of its franchises to any other railway company—provided that the assent in writing of the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines and Northern Railway Company shall be necessary before any such lease or disposition can be made to any other than the parties above named.

### ARTICLE 3.

The capital stock of this corporation shall be one million (\$1,000,000.00) dollars, which shall be divided into shares of one hundred (\$100.00) dollars each and shall be paid in at such times and in such manner as the Board of Directors may determine, and the Board are authorized to receive in payment therefor the property and franchises in the City of Des Moines, now held by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Trustee, Jas. F. How and Grenville M. Dodge.

### ARTICLE 4.

The affairs of the Company shall be managed by a Board of eight directors, who shall be elected annually, by the stockholders, on the first Thursday of January of each year. The provisional Board of Directors, who shall hold office until the first Thursday in January, A. D. 1886; shall consist of Jas. F. How, A. L. Hopkins, A. A. Talmage, J. S. Runnells, J. S. Polk, F. M. Hubbell, G. M. Dodge, C. F. Meek.

Four members of the Board shall be nominated by the Wabash, St. Louis & Pacific Railway Company, two members by the Des Moines Northwestern Railway Company and two members by the St. Louis, Des Moines & Northern Railway Company,

and no stockholders shall be eligible for membership of the Board unless so nominated.

The fact that a candidate has been duly nominated shall be certified to the stockholders' meeting of this Company by the Secretary of one of the respective companies aforesaid and such certification shall be conclusive.

The provisions herein with respect to nomination for the Board of Directors shall apply to and be enjoyed by any grantee or assignee of either of the railway companies aforesaid. No contract, lease, or other agreement, amounting to a permanent charge upon the property of the corporation, shall be entered into by the Board unless the same shall have been first approved by the Des Moines & St. Louis Railroad Company, The Des Moines Northwestern Railway Company and the St. Louis, Des Moines and Northern Railway Company, or their assigns, and shall have been submitted to a meeting of the stockholders, duly called, and shall have been approved by more than three-fourths of all the stockholders; and it shall not be within the power of the Board of Directors to create any limitation whatsoever upon any of the franchises of the corporation, except the same shall have been submitted to and approved by the Stockholders as hereinbefore provided.

The Directors shall elect, from their number, a President, Vice-President, Secretary and Treasurer. All vacancies arising from the death or resignation of a member of the Board shall be filled by the Board.

## ARTICLE 9.

These Articles may be amended by a vote of more than three-fourths of all the stock in favor thereof, at a meeting of stockholders thereof, of which a notice containing the proposed amendments shall be mailed to each stockholder at his address, as disclosed by the transfer books of the

Company. Notice of such proposed meeting shall also be given by publication for three successive weeks in some newspaper of general circulation—published in the City of Des Moines, Iowa."

It is to be observed:

First: The business of the corporation was expanded greatly beyond what was to be done under the agreement, as it was "the construction, ownership and operation of a railway in, around and about the City of Des Moines" and all sorts of things and everything incident thereto.

Second: The corporation was organized for pecuniary profit.

Third: The Company could not lease or otherwise dispose of its franchises without the consent of the Railroad Companies.

Fourth: The stock of the Company was to be paid for by the property held under the agreement of January, 1882.

Fifth: The members of the Board of Directors were to be nominated, four by the Des Moines & St. Louis Co. and two by each of the other Railroad Companies.

Sixth: No contract, lease or other agreement amounting to a permanent charge upon the property of the corporation could be made by it without approval of the Railroad Companies.

Seventh: These Articles could be amended only by a

vote of more than three-fourths of the shareholders and by such vote could be amended.

None of these provisions of the Articles of Incorporation limited or impaired in any way the title to the property which was to be and later was conveyed to the Terminal Company. The railroad companies and Col. How and General Dodge had an absolute title to the property and they conveyed all the title and all the interest they had to the Terminal Company.

The restrictive provisions of the Articles of Incorporation simply determined the mode in which and the limitations under which the powers of the Terminal Company were to be exercised.

#### **Resolutions for Transfer of Property to Des Moines Union Railway Company.**

On January 1st, 1885, at a meeting of the shareholders of the St. Louis, Des Moines & Northern Co. the following resolution providing for the conveyance and transfer of all its right and interest in the terminal property at Des Moines to the Des Moines Union Railway Company was unanimously passed (Vol. II, p. 423):

"Whereas, The Des Moines and St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines and Northern Railway Company, G. M. Dodge, James F. How and James F. How, Trustee, on the 2nd day of January, A. D. 1882, entered into a contract whereby it was agreed to purchase, hold, control and use certain real estate and franchises in the City of Des Moines, which had theretofore been held and used by certain of the individual parties thereto, for certain purposes and upon certain conditions set out in said contract; and

Whereas, On the 10th day of December, A. D. 1884, a corporation under the name and style of the Des Moines Union Railway Company was organized as contemplated, and provided in the aforesaid contract to acquire, hold, use and enjoy the real estate property, rights and franchises in the City of Des Moines, east of Farnham Street in said city of the aforesaid railway companies and signatories of said contract acquired or held thereunder and to carry out the purposes of the said contract of January 2nd, 1882.

Now, Therefore:

1. Resolved, That this Company accepts and ratifies, so far as its interests are affected thereby, the Articles of Incorporation of the Des Moines Union Railway Company as in substantial accord and compliance with the terms and conditions of the said contract of January 2, 1882, and undertakes to discharge all the obligations imposed upon it by said contract in order to make effective the purposes of said Des Moines Union Railway Company.

2. Resolved, That the proper officers of this Company be authorized upon the issuance to it of the share of the bonds and stock of said Des Moines Union Railway Company to which it may be entitled, under said contract to convey, assign and transfer to said Company all its rights, title and interest of whatever name and character, in and to the real estate, franchises, choses in action, and rights in possession or contingent to all the property in the City of Des Moines east of Farnham Street in said city, now held, enjoyed or claimed by either or all of the signatories of said contract of January 2nd, 1882, or any agent or trustee thereof purchased, acquired or held in pursuance of said contract."

At the same meeting the following resolution pro-



viding for the transfer of the management and operation of the property was passed (Vol. IV, p. 1474):

“Resolved, That the proper officers of the Company be authorized to transfer the management and operation of its property in Des Moines so far as the same may now be vested in the Company on the first day of January or as soon thereafter as practicable, leaving the question of settlement between this Company and the Des Moines Union Railway Company as authorized under the resolution for that purpose heretofore this day adopted to be arranged as directed therein.”

On the same day like resolutions were passed at the shareholders' meeting of the two other Railway Companies.

It is to be observed that by these resolutions the Railroad Companies intended three things—first, a ratification of the incorporation of the Des Moines Union Company, which involved approval of the ownership of the terminal property by that Company; second, a sale of the terminal property to the Des Moines Union Company in consideration of its stocks and bonds, and, third, the immediate transfer of the control, management and operation of the property to the Des Moines Union, leaving the settlement of the amount of stocks and bonds to be paid for the property to be determined thereafter.

On the same day at a meeting of the Directors of the Des Moines Union Company the following resolutions were adopted (Vol. II, p. 433):

“Resolved,

#### FIRST.

That this Company accepts the transfer and management and operation of said property in

the City of Des Moines, east of Farnham Street in said city, heretofore owned and controlled by the Des Moines & St. Louis Railroad, Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, and the several others, parties to said contract, and assumes control thereof from this date, so far as practicable, and it hereby instructs its President to make such order as may be necessary to render such control and management effective, as provided in said contract.

## SECOND.

That the President, Vice-President, Secretary and Treasurer of this Company be, and they are hereby, appointed a committee to confer with the several parties to said contract and agree with them severally upon the terms and price at which they will respectively assign, transfer and convey said railroad property and franchises to this Company, and procure from them, and each of them, such conveyance and transfers as may be necessary to fully invest this Company with the title, control and management of said properties provided for in said contract of January 2nd, 1882.

## THIRD.

That to enable this Company to pay for the property and to maintain, operate and improve the same, and purchase other property necessary to carry out its objects, and remove any and all liens or incumbrances thereon, and pay off all just claims against the same, the President and Secretary of this Company are hereby authorized and directed to issue full-paid capital stock of this Company not to exceed one million (\$1,000,000.00) dollars and not to exceed five hundred (500) bonds of this Company, of the denomination of one thousand dollars (\$1,000.00); the form to be agreed upon hereafter by this Board.

And to secure said bonds, the President and Secretary are authorized and directed to execute, in the name of this Company, a first mortgage or deed of trust, conveying all of said property so to be conveyed to this Company or thereafter to be acquired, to a trustee therein named, the form of which deed of trust shall be hereafter determined by this Board.

And when said committee shall have agreed with the said several parties to said contract as to the amount of bonds and stocks of this Company necessary to be delivered to them, and each of them, in payment for said railroad property and franchises, the President and Secretary of this Company shall deliver the same to said several parties as each appear to be entitled, on receipt of the conveyances and assignments of said property so to be made to this Company."

Here, then, was the assent of the Des Moines Union to purchase this property with its stocks and bonds and at once to take over its control, operation and management.

### **The Terminal Mortgage.**

But financial difficulties intervened. The railroad enterprises were not prosperous and nothing was done in the way of carrying out these resolutions until some time in 1887, when a mortgage by the Des Moines Union of all its property was prepared by Col. Blodgett, the General Counsel of the Wabash and of the Des Moines and St. Louis. The mortgage is dated November 1st, 1887, but was acknowledged February 28th, 1888, and recorded May 21st, 1888 (Vol II, p. 459).

The mortgage recites that the Des Moines Union is

"fully authorized to locate, construct, **own** and operate a railway in, around and about the City of Des Moines" and that it "has undertaken and partially completed the construction of a railroad in the City of Des Moines," and that it "has purchased, acquired and owns by condemnation and otherwise, valuable real estate in said city, and valuable franchises from the City Council of said city" (Vol. II, p. 460), and

"Whereas, For the purpose of paying for the property aforesaid, aiding in the construction and extension of said railway, perfecting the title to said property, and completing all necessary and desirable improvements thereto and thereon, said party of the first part proposes to issue its bonds to the amount of eight hundred thousand (\$800,000) dollars, to be dated on the first day of November, 1887, in accordance with the resolutions and orders of its Board of Directors at a duly called and authorized meeting thereof."

The mortgage described the property covered by it by detailed descriptions which include all the property that was ever within the scope of the agreement of 1882 and then to leave no doubt contains this paragraph (Vol. II . 464):

"Also all the property and realty embraced in the several conveyances made to the said Des Moines Union Railway Company by James F. How, Trustee, James F. How, Grenville M. Dodge, the Des Moines Northwestern Railway Company, the Des Moines and St. Louis Railway Company, and the St. Louis, Des Moines & Northern Railway Company, or any other person or corporation not specially named above, and for which conveyances reference is hereby prayed to the records of said Polk County, Iowa."

The mortgage was in the general form usual at that time.

While this mortgage was in the course of preparation, the Railroad Companies and the Terminal Company were engaged in carrying out the purposes of the resolutions of 1885.

### **Resolutions for Conveyance by How and Dodge.**

Those resolutions, through inadvertence, perhaps, contained no direction to the Trustees, Col. How and General Dodge to make conveyance of the property held by them, and this omission was now supplied.

November 5th, 1887, the Board of Directors of the St. Louis, Des Moines and Northern passed the following resolutions (Vol. II, p. 435):

“Whereas, James F. How has prior to 1881 and since then purchased certain property and made expenditures on same as Trustee for this Company, the money expended for said property being furnished by the Wabash, St. Louis & Pacific Railway Company, and

Whereas, Under an agreement between the Company and the Wabash, St. Louis & Pacific Railway Company and others it was intended that said property, standing in the name of James F. How, Trustee, should be transferred to the Des Moines Union Railway Company under certain conditions, it is hereby

Resolved, That James F. How is requested by this Company to transfer to the Des Moines Union Railway Company the property referred to above, so purchased on receiving from said Company a stipulation that as soon as practicable after the transfer said Union Railway Company is to deliver to him first mortgage bonds of that Company to the amount of the money advanced for the pay-

ment of said property and improvements, with interest on same and taxes paid thereon and also three-fourths of the stock of the Des Moines Union Railway Company, said bonds and stock to be transferred by said How to the Purchasing Committee of the Wabash, St. Louis & Pacific Railway Company or their successors or assigns in lieu for the money advanced by said Company to make the purchase of the above property and improvements and the payment of taxes for this Company.

Whereas, Grenville M. Dodge has prior to 1881 and since then purchased certain property and made expenditures on the same as Trustee for this Company, the money expended for said property being furnished by the said Dodge, and

Whereas, Under an agreement between this Company and the Wabash, St. Louis & Pacific Railway Company and others it was intended that said property standing in the name of Grenville M. Dodge, Trustee, and Grenville M. Dodge, individually, should be transferred to the Des Moines Union Railway Company under certain conditions, it is hereby

Resolved, That Grenville M. Dodge is requested by this Company to transfer to the Des Moines Union Railway Company the property referred to above so purchased on receiving from said Company a stipulation that as soon as practicable said Union Railway Company is to deliver to him first mortgage bonds of that Company to the amount of the money advanced by him for the payment of said property and improvements, with interest and taxes on the same, and also one-fourth of the capital stock of the Des Moines Union Railway Company."

Similar resolutions were passed by the two other Railroad Companies on November 8th (Vol II, p. 437 and 442).

### **Assent by the Terminal Company.**

And on November 8th the Terminal Company passed resolutions assenting to the proposals of the Railroad Companies (Vol. IV, p. 1299) and authorizing the delivery of its stocks and bonds in payment of the property conveyed to it.

### **The Deeds of Conveyance.**

Conveyances were now made by the Trustees, Col. How and General Dodge, of the land standing in their names (Vol. II, pp. 446 to 453).

Under date of November 7th, 1887, the St. Louis, Des Moines and Northern made a deed to the Des Moines Union of the property standing in its name, which, after describing the property conveyed, reads as follows (Vol. II, p. 456):

“Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest in the above described property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said parties of the second part and assigns forever.”

There could hardly be left in the grantor after all this, the entire beneficial interest in the property.

Under date of February 21st, 1888, the Des Moines and St. Louis Company executed a deed which, after specifically describing a number of parcels of real estate conveyed by the deed, proceeds (Vol. II, p. 458):

"And all of the real estate within the City of Des Moines, Iowa, which is the property of the grantor, together with all real estate which may hereafter be acquired by this grantor either by condemnation proceedings or otherwise. Also all its embankments, bridges, turnouts, sidetracks, buildings and structures, water tanks and fixtures, shops, engine and other houses, depots, turntables and all its railroad property acquired and to be acquired, and everything appurtenant to said railroad, and all franchises and rights it may have acquired by grant, donation, purchase or otherwise and particularly all rights, franchises and privileges granted by the City of Des Moines, Iowa, under an ordinance "Granting the right of way to the Des Moines and St. Louis Railroad Company and its assigns, over, across, along and upon certain streets and alleys in the City of Des Moines, Iowa, and the right to bridge the Des Moines River on the south alley in said city between Court Avenue and Vine Streets. And the said Des Moines and St. Louis Railroad Company hereby covenants to warrant and defend the said premises against all the lawful claims of all persons whomsoever, claiming by, through or under it."

The contention is made in the face of this warranty deed that the grantor reserved to itself and to the two other Railroad Companies the entire beneficial interest in all the property conveyed.

The bonds of the Terminal Company were delivered to the Railroad Companies, and by them were sold



upon the general market. It is conceded by petitioners that the bonds were a lien upon the property of the Terminal Company, but it is contended that the stock represents no sort of beneficial interest in that property.

Actual possession of the property was taken by the Terminal Company May 1st, 1888, and ever since then that Company has held possession of and has operated the property.

### **The Operating Contract of 1889.**

Under date of May 10th, 1889, a contract was made between the Terminal Company and the three Railroad Companies, effective from May 1st, 1888, and to run for thirty years from that time, providing for the use and operation of the property by the Terminal Company.

This contract was prepared by the General Counsel of the predecessor of the Wabash Company.

The preliminary recitals of this contract are as follows (Vol. II, p. 479):

“This agreement, made and entered into this 10th day of May, A. D. 1889, by and between the Des Moines Union Railway Company, of Des Moines, Iowa, party of the first part, and the Des Moines & St. Louis Railroad Company, the Des Moines & Northwestern Railway Company, and the St. Louis, Des Moines & Northern Railway Company, parties of the second part, witnesseth that:

Whereas, The said party of the first part is the owner of valuable terminal facilities in the City of Des Moines, Iowa, hereinafter described; and

Whereas, The respective parties of the second part have railroads in the State of Iowa which

terminate at, or run into and through, said City of Des Moines, and in order to prevent unnecessary expense, inconvenience and loss attending the accumulation of a number of stations, and in order to facilitate the public convenience and safety, it has become important that said second parties should have the use of the terminal facilities of said first party; and

Whereas, Said party of the first part has become incorporated and organized under the laws of the State of Iowa for the purpose of owning and operating a line of railway in the said City of Des Moines, Iowa, extending from the eastern boundary line of said city to Faruham street, in western part thereof; and

Whereas, Said party of the first part, in pursuance of said charter, has acquired and now owns a railway in said city, as above set forth, and has already acquired or constructed a large number of valuable main and side tracks, depots, depot grounds, lands, yards, shops, round houses, freight houses and other terminal facilities, and intends to acquire and construct more; and

Whereas, Said second parties are each desirous of having the right to use said terminals in connection with their respective railroads; and

Whereas, For the protection of the parties hereto and their assigns, it is important that the rights, duties and liabilities of each in regard to the whole subject-matter of said terminal facilities, including their use, care, control, rental, taxes, expenses, renewals, insurance, and repairs, shall be stated and defined.

Now, therefore, in consideration of the premises, it is mutually agreed by and between said party of the first part and each of the several parties of the second part (each of said second parties contracting for itself), as follows:"

The contract then provides for the acquisition of

more property and the construction of more facilities by the Terminal Company, as follows (Vol. II, p. 480):

**Section One.** The party of the first part agrees to proceed with reasonable dispatch, and whenever its Board of Directors shall deem it expedient, to erect and furnish for the use of the parties of the second part, in said City of Des Moines, a union passenger depot, and such additional switches, sidings, freight depots, round houses, shops, water tanks and yard appurtenances, as the Board of Directors of said first party may consider reasonable, and for those purposes said first party shall acquire by lease, purchase, or otherwise, such additional real estate as may be necessary.

**Section Two.** The amount of such additional grounds, and the form, character and cost of said union depot and other structures and appurtenances to be erected and furnished by said party of the first part, as well as the management, operation, improvement and repairs thereof, shall in all matters not otherwise specifically provided for herein, be determined by the Board of Directors of said first party."

Other sections of the contract prescribe details of the service to be rendered and the charges therefor.

There are sections dealing with the transfer of stock in the Terminal Company to be considered later.

This contract was observed by the parties and their successors until the close of its term.

### **Amendment of Articles of Incorporation of the Des Moines Union Railway Company.**

The petition for certiorari, p. 6, states that:

"He (F. M. Hubbell) caused the records of the Des Moines Company (the Terminal) without

knowledge or consent of the railway companies to purport to show that at a meeting of its stockholders, when in fact no stock had been issued or subscribed, its articles of incorporation had been amended so as to eliminate all the rights and interests of the railway companies in their joint railroads and terminal facilities and create a colorable claim that the Des Moines Company had acquired them, etc."

This is a charge, certainly a suggestion, that the amendments to the articles of incorporation were furtively made by Mr. Hubbell.

A recital of what was done, with references to the record, will show that nothing was done without the presence of all parties in interest and participation by them.

It is true that at this time no certificates of shares had been printed and issued to the parties entitled, but the authorized amount of capital stock had been determined, its issuance in payment of property received had been directed and the amount due to each of the railroad companies had been settled.

The integrity of the records of these various corporations is not impeached, and there is nothing in the testimony to contravene any recital of facts in them.

At the annual meeting of the stockholders of the Terminal Company held January 3rd, 1890, among other things done, a Board of Directors for the ensuing year was elected. General G. M. Dodge presided at the meeting.

J. F. How, on behalf of the Wabash Railroad Co., operating the Des Moines and St. Louis R. R. Co., nominated Jas. F. How, C. M. Hays, W. H. Blodgett and A. B. Cummins "to be voted for as directors of

of the Des Moines Union Railway Company to represent the said Wabash Railroad Company, it having been certified to this meeting by the secretary of the Wabash Railroad Company and Des Moines and St. Louis Railroad Company that the above named gentlemen had been duly nominated as candidates for directors in this company on behalf of the Wabash Railroad Company, and the Des Moines and St. Louis Railroad Company" (Vol. IV, p. 1306).

Col. Jas. F. How was a vice-president of the Wabash Company and C. M. Hays was its general manager.

The same record shows that General Dodge, on behalf of the Des Moines and Northern nominated himself and L. M. Martin as directors of the Terminal, and F. M. Hubbell, on behalf of the Des Moines and Northwestern, nominated himself and F. C. Hubbell to represent his company.

The men nominated were all elected. Here was an annual meeting, of which every stockholder had constructive notice, and which was attended in the only way in which corporations can attend, that is, by personal representatives, by every stockholder in the company, and those representatives were on behalf of the Wabash, Col. J. F. How and Chas M. Hays; on behalf of the Des Moines and Northern, General G. M. Dodge and L. M. Martin, and on behalf of the Des Moines & Northwestern, F. M. Hubbell and F. C. Hubbell.

Further proceedings were had at this meeting as follows (Vol. II, p. 1307):

"James F. How moved that the question of amending the articles of incorporation of this Company, as well as the question concerning issuing of stock for the purchase price of the

terminal property be referred to Attorneys W. H. Blodgett and A. B. Cummins for their investigation and recommendation."

Thus, what the petition for certiorari says was done by F. M. Hubbell "without knowledge or consent of the railway companies" was initiated at a meeting presided over by Gen. Dodge of the Des Moines and Northern, being moved by Col. How of the Wabash and referred for investigation and recommendation to Col. Blodgett and Hon. A. B. Cummins, both representing the Wabash.

This meeting adjourned without action on the amendments to February 18th. Meanwhile the attorneys were busy. Mr. Cummins prepared the amendments and sent them to Col. Blodgett for review (Vol IV, p. 1598).

At the February meeting, there being present A. B. Cummins, representing the Wabash, L. M. Martin for the Des Moines and Northern and F. M. and F. C. Hubbell of the Des Moines and Northwestern, the proceedings had were as follows (Vol. IV, p. 1311):

"The secretary reported that notice of the meeting had been duly published and also reported that he had, pursuant to the articles of incorporation, notified each stockholder of the time, place and object of this meeting, which notice contained the amendments proposed to be offered to the articles of incorporation.

Upon motion of A. B. Cummins the report of the secretary was adopted and this meeting declared to be duly and legally called, for the purpose of considering and adopting or rejecting amendments to the articles of incorporation.

Thereupon A. B. Cummins presented certain amendments to the articles of incorporation.

Thereupon F. M. Hubbell moved that the meeting of stockholders do now adjourn for the purpose of having further opportunity to examine said amendments, to meet on Tuesday, the 8th day of April, 1890, at ten o'clock a. m., which motion being seconded, was unanimously carried and thereupon the meeting of stockholders adjourned to meet as aforesaid."

At the meeting on April 8th there were present three men who had been elected as Wabash directors of the Terminal Company, viz., J. F. How, C. M. Hays and A. B. Cummins; one a director representing the Des Moines and Northern, viz., L. M. Martin, and the Hubbells, F. M. and F. C., representing the Des Moines and Northwestern.

The record, Vol. II, p. 488, *et seq.*, shows that the amendments to the articles of incorporation were offered one by one, the different individuals present each taking a hand, and all were unanimously adopted.

Under the law of Iowa, it was necessary for the officers of the Des Moines Union Company to certify the adoption of these articles of amendment and formally to acknowledge the certificate.

This was done by F. M. Hubbell, F. C. Hubbell, L. M. Martin, A. B. Cummins and Horace Seeley on April 10th, 1890; by James F. How, Charles M. Hays and Wells H. Blodgett on April 14th, 1890; by G. M. Dodge, April 16th, 1890, and by H. D. Thompson, April 21st, 1890 (Vol. IV, pp. 1604-1610).

The articles as thus amended and certified were filed for record with the local recorder on April 23rd, 1890, and with the Secretary of State on May 12th.

And then notice of these amendments under signature of General Dodge as president of the company,

attested by F. M. Hubbell as secretary, was published in the Des Moines Leader for four consecutive weeks, from April 23rd to May 20th, 1890.

And under these amended articles and in accordance with them all parties concerned voted their stock, elected directors and did business generally without complaint for seventeen years, or until about the time of the institution of this suit.

These amendments were made in light and leisure, not in haste and darkness as charged in the petition.

And so Mr. Hubbell did not cause the records of the Terminal Company "without knowledge or consent of the railway companies to show" that the articles of incorporation were amended, but all concerned, the representatives of all the railroad companies, and particularly the Wabash, believed that amendments were necessary and acting with great deliberation, after successive adjournments and always under the advice of competent counsel, made, published, declared and accepted those amendments.

### **Issuance of the Capital Stock of the Terminal Company.**

The petition (p. 6) states that F. M. Hubbell caused 4,000 shares of the stock of the Terminal Company "to be issued under Article III of the alleged amended articles, which falsely stated the stock would be issued in payment for the property, bonds having been previously issued for that purpose. The stock was therefore issued without consideration."

This is distinctly misleading in its suggestion. What was done respecting the stock of the Terminal Company, from beginning to end was with the knowledge,



approval and active participation of each and every one of the railroad companies, the original ones and their successors and assigns.

Article III of the original articles of incorporation of the Terminal Company (Vol II, p. 420), provided that the capital stock of the corporation should be one million dollars and the board of directors was authorized to receive in payment therefor the Des Moines properties and franchises of the three railroad companies.

These properties and franchises had been acquired from time to time since 1880. When they incorporated the Terminal and took over the property, they gave bonds to the parties who had advanced money for the property in amounts equal to the money advanced and as further consideration for the property acquired distributed the stock one-half to the Des Moines and St. Louis and one-fourth to each of the other companies (Vol. II, pp. 423, 435, 436, 437, 438, 442).

In November, 1887, the articles of the Terminal Company were amended increasing the capital stock to two million dollars (Vol. IV, p. 1298).

The contract of May 10th, 1889, precedes by nearly a year the amendments to the articles of the Terminal Company made in 1890. This contract recites, section 26, that the Des Moines and St. Louis Company is entitled to one-half of the capital stock of the Terminal Company, and the two other companies each to one-fourth. It further recites that "no certificates for said shares have yet been issued to said parties," and then proceeds to say that certificates shall be issued for ten thousand shares, par value one hundred dollars each, to the Des Moines and St. Louis and for

five thousand shares to each of the other railway companies (Vol. II, pp. 486 and 487).

But no stock certificates were in fact printed and issued to the railway companies at this time. They proceeded in the view, however, until in 1890 they amended the articles of incorporation, that they held stock in the Terminal Company in the amount and proportion stated in the agreement of May 10th, 1889.

There was no doubt some water in this stock, but of this the petitioners cannot complain, for they or their predecessors did the watering.

Mr. Cummins set about to correct this evil by an amendment to the third article of incorporation of the Terminal Company, which provided, among other things (Vol. II, p. 490):

“The capital stock of the corporation shall be two million dollars (\$2,000,000), which shall be divided into shares of one hundred dollars each; said shares shall be paid for and issued in the manner following and not otherwise; four thousand shares as a part of the purchase price of the Terminal property originally acquired by the corporation, it being now agreed by all the stockholders that said sum of four hundred thousand dollars, together with the first mortgage bonds theretofore issued for that purpose constituting the fair value of said property when so acquired; and all resolutions and proceedings of the corporation heretofore had with respect to the amount of capital stock to be issued as such purchase price, are set aside and held for naught.

Said four thousand shares of the capital stock shall be issued to the following corporations and in the following proportions:

Two thousand shares to the purchasing committee of the Wabash, St. Louis & Pacific Railway Company, successor in ownership to the Des

Moines and St. Louis Railroad Company, and the present owner of the property known as the Des Moines and St. Louis Railroad.

One thousand shares to the Des Moines and Northwestern Railway Company, successor to the Des Moines Northwestern Railway Company, and

One thousand shares to the Des Moines and Northern Railway Company, successor to the St. Louis, Des Moines and Northern Railway Company, and the said shares are hereby declared to be fully paid by the transfer of the aforesaid property. The remaining capital stock, to-wit, sixteen thousand shares, or any part thereof, shall be issued only by the authority of a resolution of the stockholders adopted by the vote of more than seven-eighths of all the stock theretofore issued, and shall be fully paid either in money or property at its fair market value, before certificates therefor shall be executed and delivered."

At this same meeting of the Terminal Company Mr Cumming introduced a resolution which explained and was intended to explain the action of the meeting with respect to the capital stock. The resolution recited that by inadvertence there was some uncertainty in the records of the Company as to the price at which the property had been acquired, and all parties being agreed that the property and franchises incident thereto should be purchased at its fair value payable partly in bonds and partly in stock fully paid and it being agreed that the property was fairly worth the sum of \$861,257.11, and the relative shares of this to which the parties respectively were entitled having been ascertained and having been adjusted and paid so far as payable in bonds, it was resolved unanimously (Vol. II, p. 496):

"1st. That the purchase price of the property

originally acquired by the Company, as above stated, be fixed at said sum eight hundred sixty-one thousand two hundred fifty seven and 21/100 (\$861,257.21) dollars as of the date of the conveyance thereof.

2nd. That the payment of a portion of such purchase price in first mortgage bonds, as above set forth, be confirmed and approved.

3rd. That to complete the payment of such purchase price, the president and secretary are hereby authorized to issue certificates for thirty-nine hundred and ninety-two (3,992) shares of stock, which shares, including eight already issued on behalf of said parties, aggregate four thousand (4,000) shares, as follows:

To the purchasing committee of the Wabash, St. Louis and Pacific Railway Company, nineteen hundred and ninety-six (1,996) shares.

To the Des Moines and Northern Railway Company nine hundred and ninety-eight (998) shares, and to the Des Moines and Northwestern Railway Company nine hundred and ninety-eight (998) shares.

4th. That the proceedings heretofore had respecting the issuance of capital stock, so far as such proceedings are inconsistent with said amendments to the articles of incorporation or with this resolution, are hereby modified to conform hereto."

Certificates of shares were now issued as provided in this resolution to the several parties on the 8th day of April, 1890 (Vol. II, p. 711).

#### **Acquisition of Terminal Stock by F. M. Hubbell & Son.**

The petition states that (p. 6):

"by mesne assignments F. M. Hubbell and his son, F. C. Hubbell, acquired individually five-

- eighths thereof, or 2,500 shares, from the company they dominated in a trade at the alleged price of ten cents on the dollar, in violation of the agreement that the stock would be sold "only to a railroad company who would join with the Wabash in making a contract with the Des Moines Company, guaranteeing interest upon the bonds, operating expenses, etc."

There was no such agreement as that stated between any of the parties, nor has the inference that F. M. Hubbell & Son acted in bad faith, in acquiring their stock any foundation in the testimony.

The original articles of incorporation contained no restriction on eligibility to ownership of stock. They did impose as a qualification for the directorship that the person must be nominated by one of the three railroad companies and they did restrict the company itself as to the disposition or burdening of the property. The parties evidently thought that individuals might become shareholders (Vol. II, p. 420-421).

The agreement of May 10th, 1889, in Section 26, did contain a restriction on the transfer of Terminal stock viz.: "all of said certificates (of shares) shall express upon their face that they are not transferable in whole or in part without the consent in writing of all the parties of the second part to this agreement (the three railroad companies) except that any shares of stock" issued to qualify some one as a director may be retransferred, etc., etc. (Vol. II, p. 487).

The three railroad companies consenting, anybody could acquire stock in the Terminal Company.

The articles of incorporation as amended in April, 1890, provided in Article 3 that the stock was transferable only on the books of the Company by and with

the consent of three-fourths of all the directors, except in case of a transferee who is or becomes the owner of one of the three lines of railroad involved and a director could not be elected except by vote of more than seven-eighths of the stockholders (Vol. II, p. 491).

Here again individuals are not disqualified, but the power of rejection is reserved to one-eighth of the shareholders.

On February 5th, 1890, Mr. O. D. Ashley, who was secretary of the Purchasing Committee of the old Wabash Company and president of the Company itself, which owned all the stock and bonds of the Des Moines and St. Louis Company, wrote F. M. Hubbell, saying (Vol. IV, p. 1599):

"I will give you for the Purchasing Committee the option of buying of them \$135,000 of the bonds of the Des Moines Union Railway Company, and one-fourth interest in the capital stock of that company for \$135,000 and accrued interest from November 1st, 1889, any time within ten days from this date. Payment to be made in cash if the option is availed of by you. (Signed) O. D. Ashley, Sec'y Pur. Com."

General Dodge came into this transaction for one half of it, leaving Mr. Hubbell with the remaining half as to which the Purchasing Committee solemnly authorized and empowered "said Des Moines Union Railway Company, or the proper officers thereof, to issue to said Hubbell or his assigns, one-eighth of all the capital stock in the said Des Moines Union Railway Company" and further, "The said Purchasing Committee hereby guarantees the approval by the Des Moines and St. Louis Railroad Company of the

transfer of said stock to said Hubbell within sixty days" (Vol. IV, p. 1601).

This sale to Hubbell was reported in writing to the Purchasing Committee and on motion of General Hubbard was approved (Vol. IV, p. 1558).

April 8th, 1890, this sale of stock was approved by the directors of the Des Moines and St. Louis Company, they being James F. How, C. M. Hays, H. S. Priest, George S. Grover, F. M. Hubbell and A. B. Cummins, all save Mr. Hubbell being Wabash representatives (Vol. II, p. 1434).

And the Des Moines Union Company itself on April 8th, by vote of all its directors, ratified and approved the sale and ordered the transfer of the certificates both to F. M. Hubbell and to General Dodge (Vol. II, p. 1312).

Pursuant to these transactions a certificate for five hundred shares was on April 8th, 1890, issued to F. M. Hubbell and for a like number to General Dodge (Vol. 2, p. 711).

April 5th, 1890, Mr. Ashley as president of the Wabash Railroad Company wrote to Mr. F. M. Hubbell as follows, viz. (Vol. IV, p. 1602):

"I have yours of April 1st, this morning. The result of my conversation with Messrs. Joy and Welles is a rather vague idea that we ought not sell \$100,000 of the Des Moines Union Railway Terminal bonds and one-eighth interest in the capital stock at less than \$115,000 and accrued interest on the bonds, and I do not feel authorized to offer it at any less price. If, however, you will make me a definite bid of the best price you can, I will communicate it to the other members of the committee and give you an early and definite reply. It must be understood, of course,

that a one-eighth interest in the capital stock shall be sufficient to represent a proprietorship in the Company according to the understanding we had when you were here."

The negotiations opened by this letter resulted in a contract on June 5th, 1890, for the purchase by Hubbell of \$50,000 of bonds and 500 shares of the stock of the Des Moines Union Company for \$57,736. Transfer of the shares on the books of the Des Moines Union was guaranteed "so far as the vote of the directors of said Des Moines Union Railway Company, representing the Des Moines and St. Louis Railway Company will secure said transfer (Vol. IV, p. 1613).

The directors of the Des Moines and St. Louis Company, on February 11th, 1891, by unanimous vote approved the sale of the stock to Hubbell; Hays and How of the Wabash Company being present (Vol. IV, p. 1438).

The Des Moines Union on the same day approved the sale and made the transfer by unanimous vote of its directors (Vol. IV, p. 1320).

The foregoing are the contracts and agreements under which Mr. Hubbell first got the Terminal stock.

The petition (p. 5) assumes to quote from an agreement providing that this stock would be sold "only to a railway company who will join with the Wabash in making a contract with the Des Moines Union guaranteeing interest on the bonds, operating expenses, etc." No such words are to be found in any agreement between any of the parties; no such restriction on transfer of stock is contained in any of the articles of incorporation, original or amended.

More than a year and a half prior to the sale of the



stock to Hubbell he wrote to O. D. Ashley, president of the Wabash, saying that he had been asked whether Des Moines Union stock could be bought and at what price. In his answer, Ashley said the Purchasing Committee would be glad to sell a quarter interest at a fair price, but he said, "I have always supposed that it would be necessary to confine the sale to such railway companies as would be interested in the station." Hubbell in his reply said, "I agree with you that the sale of a quarter interest in the stock of the Terminal Company should be made only to a railway company who will join with the Wabash in making a contract with the Des Moines Union guaranteeing the interest upon the bonds and operating expenses, etc." He says that a certain Mr. Jones has been making inquiries about the shares, but he takes no stock in Jones (Vol. III, pp. 1059-1060). The last letter was written on June 18th, 1888. The subject of sale or purchase of stock by anyone in the Des Moines Union was not broached again until February 5th, 1890, when an entirely new and distinct chapter was opened by the option which Mr. Ashley gave to Mr. Hubbell.

The two transactions were distinct and unrelated, and they were eighteen months apart in time. Nothing was said in 1890 as to limiting sales of Terminal stock to certain railway companies. It is evident that Mr. Ashley, on behalf of the Wabash Company, wanted to market some Terminal stock and bonds. The transactions with General Dodge and F. M. Hubbell were sales of bonds and stocks pure and simple. And in making these sales the Purchasing Committee acted with full knowledge of the situation. Months passed by before the last sale was consummated by transfer of the stock. In truth, the money paid at the time was a

great desideratum, and the record shows that it was paid by Dodge and Hubbell to the Purchasing Committee and by that committee to the Wabash Company.

### **Relation of the Milwaukee Company to These Shares.**

The Milwaukee Company has acquired the two Northern lines and in connection with them one thousand shares of the stock of the Terminal. The original Northern Companies lost the properties by foreclosure. New companies were formed, which afterward were consolidated. In the course of these proceedings Hubbell and Dodge transferred their Terminal shares to the consolidated company, which then had 3,500 shares. The consolidated company did not fare well, and being in need of money, pledged 2,500 of its Terminal shares to F. M. Hubbell & Son. These shares were by agreement of the parties taken by F. M. Hubbell & Son in liquidation of some indebtedness. This was in 1893.

This Northern Company found itself very dependent upon the Milwaukee, and whether it would prosper or not was determinable by the division of rates it secured from the Milwaukee. To get a better division the Hubbells, who were largely interested in the securities of the Northern Company, both stocks and bonds, in the year 1894 gave a large block of the stock of the Northern Company, 16,800 shares, to the Milwaukee, together with an option to the Milwaukee to purchase 16,468 shares more at a low price and the exercise of this option would give the Milwaukee full control of the Northern Company (Vol. II, p. 828, and Vol. IV, p. 1618).

At the very beginning of the negotiations leading up

to these contracts which were executed in July, 1894, although dated March 15th, and indeed so early as February 22nd, 1894, Mr. Hubbell wrote to Mr. Miller, president of the Milwaukee Company, as follows:

"Your favor of the 20th is received and noted. Enclosed I send you a copy of the articles of consolidation and incorporation and trust mortgage of the Des Moines, Northern and Western Railway Company. There has been bonds issued on this property to the amount of \$2,770,000. I have no printed copy of the articles of incorporation of the Des Moines Union Railway Company, but will say they were drawn by our attorney, Mr. A. B. Cummins, and I think are all right, and if important to you, can have a copy made and sent you. The amount of bonds authorized by that corporation is \$800,000, bearing 5 per cent interest, of which amount \$612,000 have been issued. I enclose plat of Des Moines Union. We have about five miles of right-of-way occupied by about twenty miles of track. **The Des Moines Northern and Western Railway Company own one-fourth of the capital stock of the Des Moines Union Railway Company. The Wabash own one-eighth and five-eighths is owned by individuals.**

If you desire any further information, I shall be glad to furnish it" (Vol. IV, p. 1617).

Thus the Milwaukee was advised from the beginning and before it came into the situation of the precise facts as to this Terminal stock, viz.: one-eighth held by the Wabash, one-fourth by the Northern Company, which the Milwaukee contemplated getting and subsequently did get, and five-eighths by individuals.

The Wabash, of course, knew that individuals held Terminal stock, because it had sold it to them.

Year after year passed, with frequent directors' meetings and annual and perhaps other shareholders' meetings of the Terminal Company, and always the Wabash and the Milwaukee were represented and always the Hubbells were present and at the shareholders' meetings they voted and were recognized as having the right to vote the 2,500 shares of Terminal stock held by them, and shown to be held by them by the books of the Company.

### **The Ratification Agreement of 1897.**

More than this, in the year 1897 a revision of the contract of May 10th, 1889, was desired by the Wabash. For the present purpose it is not necessary to detail the negotiations which followed. There resulted a contract, dated July 31st, 1897, which in some measure is a revision, but more strictly a ratification of the old agreement (Vol. II, p. 506).

There seemed to be some doubt whether the railroad companies, then the Wabash and the Des Moines, Northern and Western, were bound by the old agreement and that was settled and the contract ratified and confirmed by the railroad companies in every respect with this exception, viz. (Vol. II, pp. 508-509):

“But it is expressly provided that so much of the said contract, a copy of which is hereto attached, as relates to the issuance and the distribution of the capital stock of the said Des Moines Company, is no longer binding, and that the capital stock of the said Des Moines Company is held as follows:

The Purchasing Committee of the Wabash, St. Louis and Pacific Railway Company, 500 shares.

The Des Moines Northern and Western Railroad Company, 1,000 shares.

F. M. Hubbell & Son, 2,500 shares.

Of the above shares belonging to said Purchasing Committee, two shares stand upon the books of the Company as follows: Joseph Ramsey, Jr., 1 share, and H. L. Magee, 1 share.

Of the shares belonging to the Des Moines Northern and Western, Railroad Company, two shares stand upon the books of the Company as follows: A. B. Cummins, 1 share, and F. M. Hubbell, 1 share.

Of the shares belonging to said F. M. Hubbell & son, five shares stand upon the books of the Company as follows: F. M. Hubbell, 1 share; F. C. Hubbell, 1 share; C. Huttenlocher, 1 share; H. D. Thompson, 1 share; A. N. Denman, 1 share."

And this contract of 1897 was formally ratified, approved and confirmed by the directors of the Wabash (Vol. IV, p. 1540); by the directors of the Des Moines, Northern and Western (Vol. IV, p. 1497), and by the directors of the Des Moines Union (Vol. IV, p. 1357).

### **Acquiescence.**

Nearly ten years passed after this without challenge of the rights of F. M. Hubbell & Son as shareholders. And during all the years they were giving their service in official relations to the development of the Terminal Company and its business, and they did this without pay, and that service constant and continuous, faithful and arduous, was accepted without question by these petitioners who now say the Hubbells have no beneficial interest whatever in the property they have served and managed so well.

### **In Conclusion.**

The case involves no profound questions of law.

The three railway companies, predecessors of the petitioners at the time of the contract of 1882, and under it, owned the property in question and every interest in that property.

The individual parties to that contract, Col. How and General Dodge, had no interest or right except to be reimbursed for what they had paid out, and they were so reimbursed.

As the railway companies made the agreement of 1882 so they could change it, and they did.

They created the Terminal Company, and they did this for the very purpose of having it acquire, own, operate and develop this property.

They transferred this property to the Terminal Company by conveyances as comprehensive in description of the rights and interests conveyed as the learning of experienced lawyers could devise.

They mortgaged this property, issued bonds secured by this mortgage, and sold those bonds to the public.

They issued stock against that same property and sold the stock.

The stock had for its basis the same property and the same interest in that property that underlaid the bonds.

The organization of the Terminal Company, the conveyance of the property to it, the contract of 1889, the amendments to the articles of incorporation in 1890, the sales of stocks and bonds, the ratification agreement of 1897, all were known to, participated in and approved by the persons who at the time were the ac-

credited representatives of these petitioners or their predecessors.

And there is not involved in this controversy anything of public interest or importance. The Terminal Company is discharging its public functions and duties and will continue to do so. Its property is affected with a public interest and is dedicated to the public use, and its obligations in this respect are the same whoever its shareholders may be or whatever may be their interest in the property. The controversy is essentially of a private nature. It is whether, notwithstanding the conveyance of the property in the most absolute terms and for a good consideration, the grantors reserved the entire beneficial interest in the property and the grantee got only a barren legal title. This affects the parties not as carriers, but as proprietors, for only proprietary rights are involved.

Respectfully submitted,

F. W. LEHMANN,  
J. L. PARRISH,  
Of Counsel for Respondents.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1918

No. \_\_\_\_\_

THE DES MOINES UNION RAILWAY  
COMPANY, FREDERICK M. HUBBELL,  
FREDERICK C. HUBBELL AND  
F. M. HUBBELL & SON,

*Petitioners,*

*v's.*

THE CHICAGO, MILWAUKEE & ST.  
PAUL RAILWAY COMPANY AND THE  
WABASH RAILROAD COMPANY,

*Respondents.*

**CROSS-PETITION FOR WRIT OF CERTIORARI**

The Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell and F. M. Hubbell & Son, respectfully petition this Court to grant a writ of certiorari to the Circuit Court of Appeals for the Eighth Judicial Circuit, to remove therefrom, for review here, the record in the case



therein pending, numbered 4885, wherein the petitioners are appellees and the respondents are appellants.

Two controversies are involved in the case, one of which was decided in favor of petitioners and the other against them and in favor of the respondents hereto.

The two controversies are fully presented by the same record and certified copies of that record accompany the petition for certiorari filed by the respondents hereto. And while the two controversies are more or less distinct, they rest upon the same evidence and grow out of the same series of transactions.

The questions to be determined are of the same general nature, involving the construction of contracts and of articles of incorporation as fixed by their terms and the conduct of the parties under them.

Your petitioners believe that if the case is one appropriate for review on writ of certiorari as to one of the controversies therein, it should in justice to all the parties be brought before the Court in its entirety, and being advised that they cannot otherwise have a review of the decision and decree herein, in so far as adverse to them, they respectfully submit this cross-petition for a writ of certiorari.

What is dealt with and designated by the parties and by the Court of Appeals as the "main" controversy or question in the case is presented by the petition of the respondents hereto. The question presented by these petitioners is designated by the parties and the Court as that of the "surplus earnings."

The "main" question is as to the rights of the Chicago, Milwaukee & St. Paul Railway Company and the Wabash Railroad Company, hereinafter called the

Railway Companies, and the Des Moines Union Railway Company, hereinafter called the Terminal Company, in and to the property to which the Terminal Company holds title and which it uses in the course of its operations as a Terminal Company.

The contention of the Railway Companies is that they are the real and beneficial owners of the property, and that the Terminal Company simply holds the title in trust for them, or that the ownership of the Terminal Company is subject to an easement in favor of the Railway Companies which gives them the right to the use of the property in perpetuity for terminal purposes at actual cost of operation, maintenance and taxes, they getting the benefit in reduction of the cost of operation of all revenue from whatever source obtained, thus depriving the Terminal Company of all beneficial interest in the property, and making its shares of stock worthless to the owners of them.

The issued capital stock of the Terminal Company amounts to four hundred thousand dollars divided into four thousand shares of the par value of one hundred dollars each, of which the Wabash Company owns and holds five hundred shares, the Chicago, Milwaukee and St. Paul Company, one thousand shares, and F. M. Hubbell & Son, twenty-five hundred shares. F. M. Hubbell & Son bought their shares from the predecessors in right and title of the Railway Companies.

The real purpose of this branch of the case, and the effect of the contention of the Railway Companies, if sustained, is to nullify and render worthless the shares of F. M. Hubbell & Son.

The determination of this "main" controversy, the Court of Appeals said, was "the definition of the legal

effect of certain instruments and acts of the parties or their predecessors in interest."

This question was decided by the Circuit Court of Appeals in favor of these petitioners, the Court holding that the Terminal Company was the absolute owner of its property, and that the rights of the Railway Companies therein or thereto were simply those of share holders in the Terminal Company.

### **The Surplus Earnings**

controversy is the subject of this petition or cross-petition for certiorari and we may say as the Court of Appeals said of the main "controversy," that the determination of it is "the definition of the legal effect of certain instruments and acts of the parties or their predecessors in interests," and the same instruments and the same acts of the same parties are involved in the petition and cross-petition. This a statement of the case will show.

In December, 1880, the Des Moines and Northwestern Railway Company and the St. Louis, Des Moines and Northern Railway Company, to which companies the Chicago, Milwaukee and St. Paul Railway is the successor, and the Des Moines and St. Louis Railway Company to which the Wabash Railroad Company has succeeded, desired to bring their lines to the city of Des Moines, the first two from the North and Northwest and the third from the South.

Among other things done by them was the acquisition of certain real estate in the city of Des Moines, respecting which they made an agreement on January 2nd, 1882, reciting the acquisition of the property and providing that the expense of acquiring and improv-

ing it should be borne one-fourth each by the Northern companies and one-half by the Southern. We can speak of them hereafter, the Northern companies as the Milwaukee and the Southern as the Wabash.

The property had been acquired chiefly in the names of individuals who were confessedly trustees for the railroad companies.

The contract provided:

"Third: \* \* \* It is understood that a depot Company may be organized and may take permanent charge of the property upon the terms herein set forth and that said Company may issue and deliver to the Companies, parties hereto, its mortgage bonds to the amount of their respective portions of the cost of the said purchases and improvements."

"Fourth: The title to said property shall be and remain in a trustee to be named by agreement by said Companies but subject to the joint use and occupation of all of said Railway Companies upon the terms herein prescribed."

"Tenth: In the event that any Company, whose railroad does not extend to Des Moines, shall effect an arrangement for running its trains into Des Moines over the railroad of either of the parties hereto, such Company shall be entitled to the use of all of said terminal facilities upon the payment of a fair sum for rental and its proportion of the maintenance account, the rental to inure to the companies hereto in the same proportion as the original outlay, and the sum due from such Company for maintenance account to be determined in the same manner as the sums due from the other companies, parties hereto. Railroad Companies whose roads extend to Des Moines, may be admitted to the use of said facilities by agreement of all the parties hereto." (Record, pp. 120-122.)

The Wabash Company was to have control, supervision and maintenance of the property and the expense of this was to be borne by the several companies on a wheelage basis.

The companies operated under this contract for some years, each doing its own terminal work, that is, employing its own engines and crews and moving its own cars.

This was not a satisfactory method of operation and in December, 1884, the Railway Companies organized the Terminal Company under the laws of the State of Iowa governing corporations for pecuniary profit, to carry out, as they said, the objects and purposes of the contract of January 2nd, 1882.

They provided for a capital stock of one million dollars "which shall be divided into shares of one hundred (\$100.00) dollars each, and shall be paid in at such times and in such manner as the Board of Directors may determine and the Board are authorized to receive in payment therefor the property and franchises in the city of Des Moines now held by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, trustee, Jas. F. How and Grenville M. Dodge." (Record, pp. 9-11.)

There was no restriction in the articles as to who might become a stockholder in the Company, but the directors were distributed among the Railway Companies, four to the Northern companies and four to the Southern. And no stockholder was eligible to a directorship unless nominated by a Railway Company.

The terminal property held by and for the Rail-

way Companies was in time duly conveyed to the Terminal Company. The consideration for such conveyance was the proportion of each of the Railway Companies of the stock and bonds of the Terminal Company. Bonds to the extent of Eight Hundred Thousand Dollars, secured by mortgage on all the property of the Terminal Company, were authorized and executed November 1st, 1887, and something above four hundred thousand of these were delivered to the parties entitled to them on account of the property then and previously conveyed to the Terminal Company. Other of the bonds were issued from time to time as other property was acquired.

No shares of capital stock were then actually printed or issued, but the parties assumed the existence and outstanding of ten thousand shares of one hundred dollars each, one-fourth as held by each of the Northern Companies and one-half by the Southern Company.

May 1st, 1888, the Terminal Company took actual possession of its property and has ever since operated the same.

The delay in the proceedings was due undoubtedly to the fact that the railway enterprises were not prosperous, the Record showing a foreclosure of mortgages in every case except that of the Terminal Company.

May 10th, 1889, the contract was made between the Terminal Company and the Railway Companies, which underlies the contention as to "surplus earnings." It was to be effective from May 1st, 1888, and to run for a period of thirty years from that date. (Record, pp. 150-159.)

When this contract was executed, the capital stock

of the Terminal Company, was owned, one-fourth by each of the predecessors of the Milwaukee Company and one-half by the predecessor of the Wabash.

The contract recited that the Terminal Company was the owner of valuable terminal facilities in the city of Des Moines and that it was important that the Railway Companies should have use of them. Also that the Terminal Company should from time to time acquire other and further facilities, among them a union passenger depot, freight depots, etc., etc., the amount, character, cost and management of these to be determined by the Board of Directors of the Terminal Company.

Section three of the contract provided:

"Each of said parties of the second part (Railway Company) for itself and its assigns, agrees to pay to said party of the first part (Terminal Company) a sum of money to be ascertained as follows, to-wit:

1st. There shall be ascertained the amount required to pay five per cent interest upon the mortgage bonds of the party of the first part, one-twelfth of which, less any deduction hereinafter provided for, shall be payable monthly as hereinafter specified.

2nd. At the expiration of each month, or as soon thereafter as practicable, there shall be ascertained the expenses of maintaining and repairing the property of the party of the first part, including the maintenance and repair of tracks, depots, round houses, engine houses, etc., during the preceding month. And in like manner there shall be ascertained the taxes, general or special, levied upon or against said property and paid

during the preceding month, or to be paid during the next succeeding month, and the insurance, if any, paid during the preceding month, or to be paid during the next succeeding month.

3rd. There shall be likewise ascertained the costs and expenses of every nature connected with the operation of said terminal station, freight and passenger depots, depot grounds, round houses, transfers and other properties, which is to include every item of expense or disbursement incurred or made by the party of the first part not hereinbefore mentioned, except the expenses specified in Section Nine hereof."

Section nine makes special provision as to the operation of engine houses, which need not be further considered.

Section four is as follows:

Having so ascertained the monthly aggregate of all the items and sums mentioned in the preceding section, *there shall be deducted therefrom the amount, if any, which other railway companies may be under obligation to pay by virtue of contracts for the use of said property, or parts thereof, for the preceding month, and the remainder shall be paid by the parties of the second part in the proportion that the wheelage of each of said parties bears to the entire wheelage of all said second parties during such preceding month, and it is expressly understood and agreed that in computing wheelage, three narrow gauge cars shall be taken as the equivalent of two standard gauge cars, and that the term "wheelage" as used in this contract means that three narrow gauge cars are to be accepted as the equivalent of two standard gauge cars.*



Provisions of the contract for the enforcement of payment need not be considered.

The contract recites the shareholding in the Terminal Company by the Railway Companies as above set forth, and further the authorized capital stock having been increased to two million of dollars "that as the authorized capital stock of said company is two million dollars, or twenty thousand shares of one hundred dollars each, the same shall be issued and held as follows, to-wit: One certificate of ten thousand shares shall be issued and delivered to the Des Moines & St. Louis Railroad Company; one certificate for five thousand shares shall be issued and delivered to the St. Louis, Des Moines & Northern Railway Company, and one certificate for five thousand shares shall be issued and delivered to the Des Moines & Northwestern Railway Company, and all of said certificates shall express upon their face that they are not transferable in whole or in part, without the consent in writing of all the parties of the second part to this agreement, except that any shares of stock issued on request of either of said companies to any person, to qualify him as a member of the Board of Directors shall be re-transferable to the company on whose request it shall have been issued without the consent of the other companies; but certificates of stock so issued shall express upon their face that they are only transferable to the company on whose request they were issued, unless consented to by the other parties of the second part.

The bonds of the Terminal Company were negotiable and were in fact sold on the open market.

The Railway Companies were interested in the Terminal Companies in two ways, first as shareholders

and second as entitled to service by the Terminal Company in accordance with the terms of the contract.

Neither of these interests was an equal one as between the companies. As shareholders, two of them had one-fourth each, and the other had one-half. So far as the service was concerned each was to pay for such service as it received, that is on a wheelage basis.

As shareholders each, if the company made any net earnings out of its property, was entitled to the proportion indicated by its holding of capital stock. As to service it paid for what it got on the terms to which it had agreed.

The charge for the service was to be ascertained as to all the companies by ascertaining certain costs and expenses, deducting therefrom certain items of credit and then dividing the remainder between the Railway Companies on a wheelage basis.

There is no controversy here as to the wheelage basis, nor as to the items of charge, which are: (1) interest on bonds, (2) maintenance and repair, (3) taxes, (4) insurance, and (5) costs and expenses of every nature connected with operation.

From the sum of these items of charge there is to be a deduction and it is as to this that the controversy arises.

The contract provides that the aggregate of the items of charge having been ascertained "there shall be deducted therefrom *the amount, if any, which other railway companies may be under obligation to pay by virtue of contracts for the use of said property or parts thereof.*"

The Terminal Company has such contracts and the amounts received under them have always been deducted from the ascertained items of charge against the Railway Companies.

And the Terminal Company has other sources of revenue. From time to time it moves cars from and to industries located on its lines to carriers other than the Railway Companies and other than those with which it has contracts, and for this it makes and collects a charge.

It leases portions of its depot building for news and cigar stands and for restaurant purposes. And it has acquired property in advance of its immediate use for terminal purposes and lets this for various purposes. The returns from this switching service and these rentals are known as "surplus earnings." At the time of the trial in the District Court these earnings aggregated about a half million dollars and they have accumulated since at the rate of about a hundred thousand dollars a year.

The Railway Companies contend that these surplus earnings should be deducted from the monthly aggregate of the items of charge against them under the contract of May 10th, 1889. The petitioners contend that, inasmuch as none of the moneys from which the "surplus earnings" are derived are "amounts to which *other railway companies* may be under obligation to pay by *virtue of contracts* for the use of said property," they should not be so deducted.

The Circuit Court of Appeals decided this adversely to these petitioners, saying of the contention of the petitioners that

*"this latter contention is a strict construction of the exact wording of the contract. It is not in our judgment a fair construction of the spirit of the agreement. This conclusion is based both upon the history of the transaction and upon the meaning to be given to this precise language when read in connection with the entire contract."*

The provision of the contract here in question, that is, section four, is clear and unambiguous in itself, providing for deduction from the aggregate of charge, the moneys received on a single account, being the amount, if any, which other railway companies may be under obligation to pay by virtue of contracts for the use of said property.

To deduct the rentals of news and cigar stands and payments for restaurant privileges is to add to the deduction provided for in the contract deductions of a very different kind, and is to write something into the contract which the parties did not write there.

"The meaning to be given this precise language when read in connection with the entire contract," is the same as when considered by itself, for this section is the only one in the entire contract dealing with this subject in any way. No other clause alludes to it even remotely and so cannot in any way qualify it.

Nor is the spirit of the agreement in any wise offended, and on the contrary, the "strict construction of the exact wording of the contract" is "a fair construction of the spirit of the agreement."

The contract is one for services by the Terminal Company, involving the use of its property, to be rendered to the Railway Companies. It did not involve the use of properties not used for terminal railway purposes. It had nothing to do with news stands or restaurants.

The Railway Companies were shareholders in the Terminal Company. Indirectly they were proprietors, and in such proportion as they had deliberately determined a number of times by agreement with each other. If there were any profits resulting from any use of this property other than that provided for by this contract

each company had its share in those profits in the measure of its indirect share of the property itself.

These "surplus earnings" were incidents of the proprietorship of the Terminal property and not incidents of the service contract between the Railway Companies and the Terminal Company.

"The history of the transaction" leads to the same conclusion. There were no individual shareholders in the Terminal Company until some time in 1890, when F. M. Hubbell and General G. M. Dodge acquired shares. Until now it was a matter of small significance what was done with the surplus earnings, for two reasons, i. e., they were small in amount and they went to the benefit of the Railway Companies in any event, and whether on a wheelage or a stock basis made no practical difference.

On February 11th, 1891, was had the first action respecting them. On that day it was ordered by the Board of Directors of the Terminal Company:

"That the rents collected for the use of the Company's real estate, and the switching charges paid in, be credited on the rolls of the different tenant companies occupying this Company's terminals, giving to each Company its share ascertained by wheelage." (Record, p. 497.)

This was a disposition of these earnings by the Terminal Company and the authority of the Terminal Company therefor was regarded as necessary. The earnings were earnings of the use of the property and not earnings of the service rendered by the Terminal Company to the Railway Companies. So they belonged to the owner of the property, and consequently the owner of the property determined the disposition of them.

On the 7th day of January, 1892, the holdings of F. M. Hubbell had increased to one thousand shares and G. M. Dodge still held five hundred, and the Board of Directors of the Terminal Company again exercised the right of disposing of these earnings by the following resolution, viz.:

"Whereas, this Company is in need of a cash capital with which to purchase supplies and pay current bills which come in before it receives its monthly revenue from the tenant companies,

Therefore, Be It Resolved: That until the further action of the Board the sums received as rents of real estate and all switching charges shall not be credited upon the accounts of the tenant companies, but shall be used for the aforesaid purposes." (Record, p. 499.)

And from this time on without question these earnings were dealt with by the Terminal Company as its own, and growing yearly in amount they were used in the acquisition of more property and in the making of improvements and extensions or accumulated as a surplus in the treasury until after January, 1906, a period of fourteen years, and but a short time prior to the beginning of this litigation.

Meanwhile the shareholding interests in the Terminal Company had greatly changed.

In April, 1890, the articles of incorporation of the Terminal Company were materially amended. At the meeting of the shareholders making these amendments on motion of A. B. Cummins, there was a valuation of the property of the Terminal Company in order to fix its fair worth in bonds and stocks, he being evidently of opinion that \$2,000,000 of stock with the bonds that had been issued constituted a material over-valuation. The fair value was fixed at \$861,257 and 21/100, the

individual interests in which were settled as follows,  
viz.:

The Wabash	\$470,110.80
The Des Moines & N. W.	215,058.40
The St. L., Des Moines & N.	100,000.00
G. M. Dodge	74,988.01
Polk & Hubbell	2,000.00
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	\$861,257.21

On this account bonds had been issued as follows:

The Wabash	\$270,000.00
G. M. Dodge	74,988.01
Polk & Hubbell	2,000.00
Des Moines & N. W.	115,000.00
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	\$461,988.01

This left aside from \$257.21 settled in cash, \$400,000, which went in shares of the Terminal Company to the parties entitled, \$200,000 to the Wabash and \$100,000 to each of the two Northern Companies.

But with this adjustment of the Terminal stock in view the Wabash Company had a short time before sold one-eighth of its allotment to F. M. Hubbell and the same amount to G. M. Dodge and a month or more later sold 500 more shares to F. M. Hubbell, so that on June 5th, 1890, the stockholding stood:

The Wabash	500	shares
Milwaukee predecessors	2,000	"
F. M. Hubbell	1,000	"
G. M. Dodge	500	"

January 15th, 1892, Dodge and Hubbell transferred their shares to a consolidated company which was the

immediate predecessor of the Milwaukee, giving it 3,500 shares and leaving the Wabash with five hundred.

October 4th, 1893, the consolidated company pledged 2,500 of its shares to F. M. Hubbell & Son as collateral for indebtedness and January 29th, 1894, sold the stock so pledged in liquidation of debt to F. M. Hubbell & Son.

Ever since January 29th, 1894, the stock of the Terminal Company has been owned:

The Wabash	500	shares
The Milwaukee, or predecessor	1,000	"
F. M. Hubbell & Son	2,500	"

It so appeared on the record and the Wabash Company was well aware of it all of the time. It had sold 1,500 of its own shares and knew where they had gone.

The Milwaukee Company became interested in the Northern railways in 1894 and acquired a majority of their capital stock in large part by gift from F. M. Hubbell & Son and in lesser part by purchase. The Milwaukee Company was advised that the consolidated Company owner of the two Northern railways, owned also 1,000 shares of the Terminal Company and no more, that the Wabash owned 500 and that private parties owned 2,500, or a majority.

With this knowledge the Milwaukee acquiesced in the disposition made of the surplus earnings for more than twelve years, after it acquired its interest in the Terminal Company.

The Circuit Court of Appeals in its opinion said and held that "a subsequent contract of July 31st, 1897, does not affect this controversy."

In this we think the Court erred, for the contract of July 31st, 1897, was a reaffirmation in terms of the



contract of May 10th, 1889. From the beginning to the time the new contract was made the "surplus earnings" had been disposed of as determined by the Directors of the Terminal Company and ever since January 7th, 1892, they had so far as disposed of, been appropriated to the uses of the Terminal Company for the acquisition of additional property. And this disposition of the earnings was deliberately approved by Mr. Hays, the Wabash representative on the Board. June 7th, 1894, Mr. Hays wanted time to consider the appropriation made to discharge a mortgage debt on some newly acquired property. June 19th, 1894, he gave his consent. In August of that year and again in November he approved of other like dispositions of these monies. At the November meeting of the Terminal Board, Mr. Cummins representing Mr. Hays, a resolution was passed directing that a certain mortgage debt be paid out of the "surplus earnings" and providing in terms that

"The term 'surplus earnings' as herein used means that fund arising from the rentals of real estate and from switching charges." (Record, p. 1344.)

Why such a resolution? If every penny received by the Terminal Company from any and all sources must be deducted from the aggregate of the charges against the tenant companies, there would be and could be no "surplus earnings." The very use of the term was an acknowledgment that the parties recognized the meaning of the contract to be expressed by what the Court of Appeals spoke of as its exact wording.

December 28th, 1886, Mr. Ashley, President of the Wabash, wanted a new contract with the Terminal

Company, because of a foreclosure of mortgage against one of the tenant companies, which had weakened the position of the Terminal bonds on the market.

When it came to drafting the new contract, changes were desired and proposed by the Wabash as to the surplus earnings, and they were spoken of as changes.

Mr. F. C. Hubbell for the Terminal wrote to Mr. Ramsey of the Wabash, as follows:

"Referring to the new terminal contract, I have seen the correspondence between you, Mr. Blodgett and Mr. Cummins. With respect to the Des Moines Union's revenue from rental and switching, would say that this fund has always been controlled by the Terminal Company, and is the only money which it has to use for other than strictly operating expenses. We therefore feel that the new contract should leave this fund the property of the Terminal Company. The rental and switching is a small item, and is now being used to pay our floating debt, consisting of \$31,000 held by Commercial Bank of St. Louis, which will consume this fund for a good many years." (Record, p. 1680.)

On the same day, February 18th, 1897, Mr. Cummins wrote to Col. Blodgett, General Counsel of the Wabash, as follows:

"Have your favor of the 16th inst., and have carefully considered the amendments that you propose to the terminal contract, and the reasons which are stated in Mr. Ramsey's letter for the changes." (Record, p. 1684.)

"With respect to the change in Sec. 4, which would require the Des Moines Co. to credit upon its expenses and disbursements the accounts re-

*ceived by it for switching charges, rental of houses and things of that character, Mr. Hubbell has written to Mr. Ramsey recalling to his attention the situation, which absolutely precludes the disposal of such revenues of the company in that way."* (Record, p. 1686.)

February 24th, 1897, Mr. Cummins wrote to Mr. Hubbell, saying, "I have a telegram from Col. Blodgett asking me to send a copy of the *amended articles* of the company," etc.

March 26th, 1897, Col. Blodgett wrote to F. M. Hubbell, enclosing proposed amendments to the contract which he speaks of as changes. The second change is as follows:

"2nd. I send Section 3 in two forms, and I need not go into any detailed explanation of them. Number one is founded upon the theory that the Des Moines Company may do a switching business during the whole period of the lease, paying, on a wheelage basis, the same proportion of interest charges, cost of maintenance and operating expenses, as is paid by the tenants, and using its net revenue throughout the term in improving the property. That is the form suggested by Mr. Ramsey and myself.

Number two presents the section as you and Mr. Ashley suggested. Under it you are to switch and handle cars for others than tenant companies, and collect the revenue, until the net profits, together with the rentals from portions of the ground, amount to fifty thousand dollars, of which sum thirty-five thousand dollars is to be applied on the floating debt, and the balance used for a working fund. And after the fifty thousand dollars has been realized, all the net revenues from switching is to go to the tenant companies to re-

duce their expenses, on a wheelage basis." (Record, p. 1687.)

Different changes were proposed by different parties, but not accepted, and the matter was closed by a ratification agreement of date July 31st, 1897.

At this time all the original parties to the contract of 1889 except the Terminal Company had gone out of business because of insolvency and new companies owned and operated their lines of railroad, one company having now acquired both Northern lines. The new contract recited this history and further that "it has been doubted whether the said contract is legally binding upon the said Wabash Company and the said Des Moines Northern and Western Company." It was provided as follows:

"Now, therefore, in consideration of the premises and for the purpose of removing all doubt with respect to the said subject, it is now agreed by and between the parties hereinbefore named that the said contract, a copy of which is attached, shall be and become binding and obligatory upon said Wabash Company and the Des Moines, Northern & Western Company.

And the said Wabash Company for itself agrees *to make the payments therein provided for at the times and in the manner prescribed for the said Des Moines & St. Louis Railroad Company so long as it operates the railroad of the said Des Moines & St. Louis Company*, and when the said Wabash Company ceases to operate the railroad of the said Des Moines & St. Louis Company its obligation to so pay, and all the obligations herein assumed by it, shall at once determine and be and become the obligations of whatever company operates the said railroad, it being the intention that the obligations of the said contract, so far as they pertain

to the Des Moines & St. Louis Railroad Company, shall attach to and become the obligations of the successor of the said Wabash Company in the operation of the said Des Moines & St. Louis Railroad, and any company succeeding the Wabash Company in such operation shall be held by the operation of trains over the said Des Moines & St. Louis Railroad, and upon the property leased in the said contract, to assume all the obligations therein or hereby undertaken by either the said Des Moines & St. Louis Company or the said Wabash Company.

And the said Des Moines, Northern & Western Company for itself agrees to assume all the obligations of a lessee railroad company as prescribed in the said contract for the entire term named therein, and as though it had been named in and was a party to the said contract when originally made, *and to pay to the said Des Moines Company at the times and in the manner therein prescribed, the sums of money which may become due, computed according to the terms and provisions of the said contract with respect to a tenant company;* and the said Des Moines, Northern & Western Company further agrees that the obligations therein named and hereby assumed shall pass with the railroad it now owns and operates, and shall become the obligations of any assignee, grantee, or successor of the said Des Moines, Northern & Western Company in the ownership or operation of the said Des Moines, Northern & Western Railroad, and any company succeeding the Des Moines, Northern & Western Company, in such ownership or operation shall be held by the operation of trains over the said Des Moines, Northern & Western Railroad, and upon the property leased in the said contract, to assume all the obligations therein expressed and herein undertaken by said Des Moines, Northern & Western Company.

But it is expressly provided that so much of the said contract, a copy of which is hereto attached, as relates to the issuance and the distribution of the capital stock of the said Des Moines Company, is no longer binding, and that the capital stock of the said Des Moines Company is held as follows:

The purchasing committee of the Wabash, St. Louis & Pacific Railway Company, 500 shares.

The Des Moines, Northern & Western Railroad Company, 1,000 shares.

F. M. Hubbell & Son, 2,500 shares." (Record, p. 506.)

Here is not only a ratification or adoption of the contract by the Wabash Company and the company to which the Milwaukee is successor, but a reiterated agreement to pay to the Terminal Company at the time and in the manner prescribed in the contract the sums of money "*which may become due computed according to the terms and provisions of said contract with respect to a tenant company.*"

And added to this is the very express recognition of the fact that there is a large, a majority interest in the shares of the Terminal Company which is independently and individually held and is interested in the construction of the contract according to its express terms.

And from this time until 1906 the contract was construed according to its terms, surplus earnings being used from time to time for the acquisition of additional property, without protest from any one and with the approval of all concerned.

In view of all the facts, preceding, attending and following the execution of the contract of July 31st, 1897,

there was manifest error in holding that it "does not affect this controversy."

The history of this transaction has in considerable part been given, but there is much more in the record of the same nature, and much of that related to the main controversy which bears directly and indirectly upon the question of surplus earnings. The Hubbells, father and son, gave liberally and freely, the son for many years entirely, their time and service to this enterprise. They fostered it during all the thirty years of the contract of 1889, which certainly they would not have done if this contract had been a barren one and their stockholdings barren also. True, for a time they were interested in the Northern railroads, but from the time the Milwaukee acquired its holdings in these they had, if the contention of the respondents now made is warranted, no interest whatever in the Terminal Company, except the holding of stock which was forever precluded from yielding any profit. Still they conducted its business, managed and directed its affairs for years and were permitted to do this by respondents without the pay of a dollar, conduct upon both sides inconsistent with any view other than that they had a substantial beneficial interest as large stockholders in the Terminal Company.

We submit that the Circuit Court of Appeals erred in holding:

1. That the contention of petitioners that the only character of credit items to which the respondents were entitled under the contract "were such as were paid by some other railway by virtue of a contract for the use of the property" while "a strict construction of the exact wording of the contract" is not "a fair construction of the spirit of the agreement."

II. That its conclusion as to what was the "spirit of the agreement was based upon or warranted by the history of the transaction.

III. That its construction of the contract giving the surplus earnings to the respondents was justified by the reading of the contract in its entirety.

IV. And in its order, judgment and decree directing the District Court of the United States for the Southern District of Iowa to so modify its decree "that the surplus earnings belong to the railways, and to appoint a master under instructions to ascertain the part due each upon a wheelage basis."

The petitioners therefore pray that a writ of certiorari issue to said Circuit Court of Appeals to remove therefrom the Record in this cause for review here by this Court of the questions presented and the errors specified in this petition.

Respectfully submitted,

J. L. PARRISH and  
F. W. LEHMANN,

Of Counsel for the Petitioners.



IN THE  
**SUPREME COURT OF THE UNITED STATES.**

October Term, A. D. 1918.

No. **8** **2** **67**

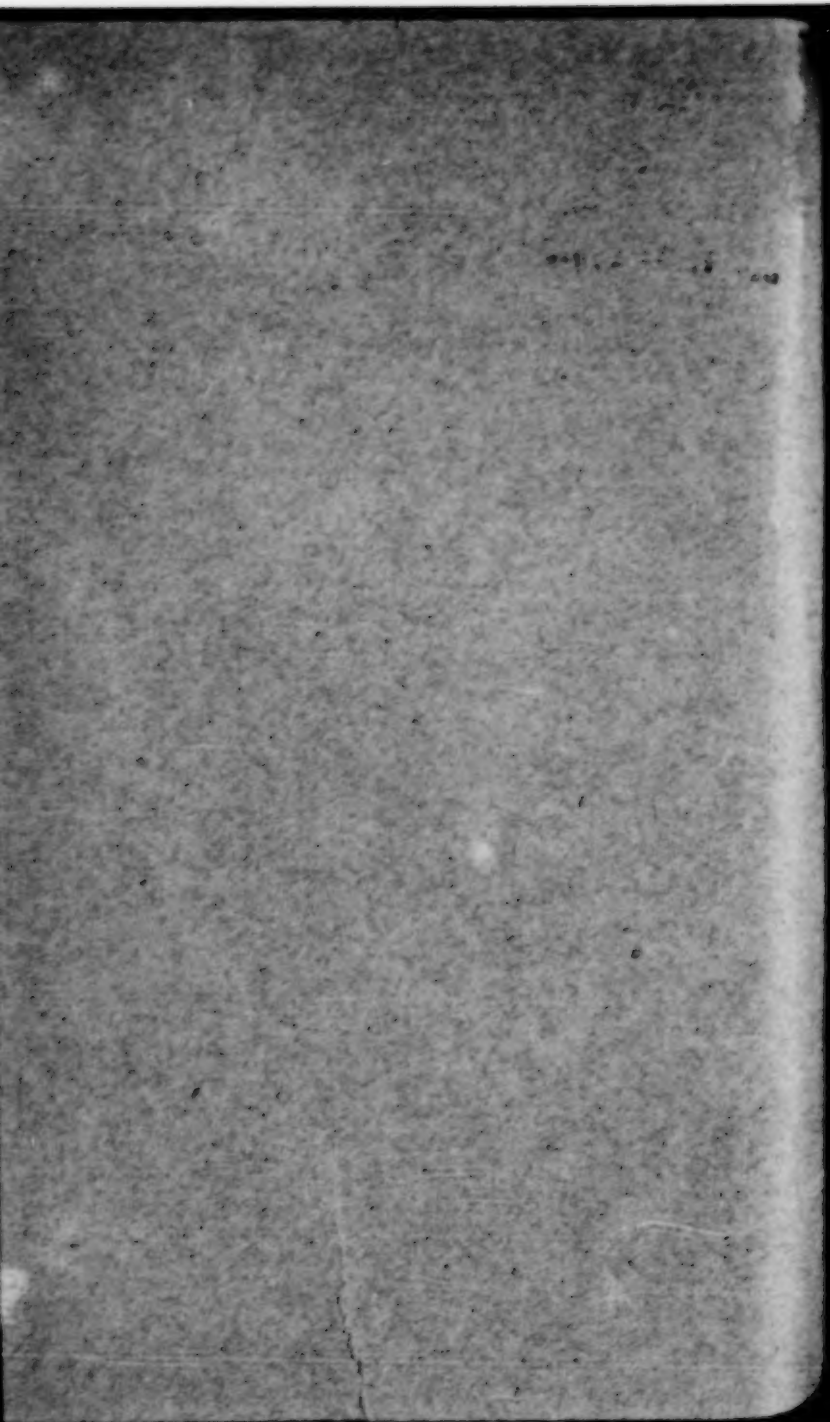
**THE DES MOINES UNION RAILWAY COMPANY,  
FREDERICK M. HUBBELL, FREDERICK C.  
HUBBELL and F. M. HUBBELL & SON,**  
*Petitioners,*

*vs.*

**THE CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY and THE WABASH  
RAILROAD COMPANY,**  
*Respondents.*

**REPLY TO CROSS-PETITION FOR WRIT OF  
HABEAS CORPUS.**

**J. L. MINNIN,**  
*Counsel for Respondent Wabash  
Railroad Company.*



IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1918,

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No. ....

---

THE DES MOINES UNION RAILWAY COMPANY,  
FREDERICK M. HUBBELL, FREDERICK C.  
HUBBELL and F. M. HUBBELL & SON,

*Petitioners,*

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY and THE WABASH  
RAILROAD COMPANY,

*Respondents.*

---

## REPLY TO CROSS-PETITION FOR WRIT OF CERTIORARI.

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Supplementing the reply of respondent, the Chicago, Milwaukee and St. Paul Railway Company, to the cross-petition for writ of *certiorari*, attention is called to the following additional matters:

## I.

The contract of May 10, 1880, on which petitioners rely (Record, p. 150), after describing the terminal property, including the proposed union passenger depot and additional facilities to be constructed, obligated the predecessors of respondents to pay the maintenance and operating cost, interest and taxes, etc., and then by section 6 (Record, p. 152) "the party of the first part in consideration of the payments to be made to it by said parties of the second part hereby **grants** to said second parties the use of its terminal properties as aforesaid"—a grant not merely of a right to use, but of the "use of", i. e., entire usefulness or **usufruct** of "its terminal properties", and, of course, includes the income derived from switching, station privileges, etc.

That the language of the grant expressed the intentions of the parties is obvious from the fact that all parties understood at the time that the grantees owned the terminal properties as shown by the evidence of Colonel Blodgett in regard to the purposes of the contract (Record, p. 266) by the resolution of the Des Moines Union Railway Company (hereinafter called the Des Moines Company), requesting him to prepare it "to be approved and executed by all lines now holding an **interest in the property**", and by its resolution that "the terms and conditions on which

the several lines now interested or which may hereafter become interested shall enjoy the use of these terminals be fully set forth in a **supplemental** agreement to be made and executed between the Des Moines Union Railway Company and each of the lines using the said terminals" (Record, p. 478). The contract could have been **supplemental** only to the contract of January 2nd, 1882 (Record, p. 120) and according to the resolution its purpose was to define the terms and conditions on which the **grantees** should enjoy the use of the terminals, not to define or recognize any right in the Des Moines Company, and accordingly no rent or compensation for the use of the terminals was reserved and all the covenants were by or for the benefit of the grantees—the Des Moines Company not having the slightest interest in their performance—it being merely an umpire or agency employed to unify the operations and bookkeeping and enforce the covenants as between the grantees for whose sole benefit they were made.

## II.

(a) The parties at the outset committed themselves to a construction of the contract which entitled the grantees to the income produced by switching, station privileges, etc., by crediting it on their bills, first, under the direction of the joint superintendent (Record, p. 271), and after February 11, 1911, pursuant to

resolution of the Des Moines Company (Record, p. 497), and they were so credited until December, 1891 (Record, p. 333), when the Des Moines Company passed a further resolution that "the sum received as rent of real estate and all switching charges" should be used "to purchase supplies and pay current bills which come in before it receives its monthly revenue from the tenant companies" (Record, p. 499), which was equivalent to crediting the sum on the grantees' bills because cash purchases of supplies and payment of current bills would to that extent lessen the grantees' bills. This method of applying such income was to be temporary "to accumulate a small fund for working capital", and it was intended the practice of directly crediting the bills should be resumed January, 1893 (see Supt.'s letter, Record, p. 338).

(b) After the Des Moines Company had thus committed itself to a construction of the contract which entitled the grantees to the income from the switching, etc., the grantees paid for the coal, labor and material necessary for the operation and maintenance of the engines, tracks, passenger station and real estate which produced the income in controversy. The petition states, on page 12, "at the time of the trial in the District Court these earnings aggregated about half a million dollars, and they have accumulated since at the rate of about one hundred thousand

dollars a year." The outlays by the grantees for fuel, labor, material, etc., in producing these earnings must have been very considerable, which, together with the protest made by the grantees when first advised, shortly before the bringing of this suit, by F. M. Hubbell, that he claimed the grantees were not entitled to such earnings (Record, p. 329), justifies the inference that the grantees made such outlays on the faith of the uniform construction of the contract by all the parties. Having stood by and knowingly permitted the grantees and their assigns to pay the cost of producing the income in controversy on the assurance of said resolutions that they were entitled to it, the Hubbells are now estopped from causing the Des Moines Company to claim, and it is estopped from claiming, the contrary.

### III

The income from switching, etc., belongs to the respondents because it was derived from the **use and occupation** of the terminal property which the predecessors of ~~Hubbell & Co.~~ secured to themselves and their successors by the contract of January 2nd, 1882 (Record, p. 120); articles of association of the depot company (Record, p. 123) and the resolutions pursuant to which the terminal property was transferred to (Record, pp. 131-7) and received by the Des Moines Company (Record, pp. 130-1).

The right to the "use and occupation" of railroad property by a railroad company under the laws of Iowa embraces the entire usefulness of the property (Cummins v. Des Moines, St. Louis Railroad Company, 63 Iowa 397, *l. c.* 405; Smith v. Hall, 103 Iowa 95, *l. c.* 96-97).

The contract of May 10th, 1889, was merely an operating agreement defining the operations of the interested railway companies for a period. The Des Moines Company under its articles of incorporation (Record, p. 123) is the agency of these companies who nominated its directors, it having undertaken by article II to exercise all of its powers "in accordance with the terms and spirit of the aforesaid contract entered into on the second day of January, 1882".

#### IV.

The petition states on page 24 that "the Hubbells, father and son, gave liberally and freely, the son for many years entirely, their time and service to this enterprise. They fostered it during all the thirty years of the contract of 1889, which certainly they would not have done if this contract had been a barren one and their stockholdings barren also", but no reference is made to the record to justify this statement. The record shows that the Hubbells agreed when they purchased the stock from Ashley that "the stock should be held by a railway com-



pany entitled to use the terminal property" and that "it would be prejudicial to sell any of this stock to outsiders" (Record, pp. 1059-1060), and contrary to this understanding they acquired the stock from the companies they dominated at a nominal value (Record, pp. 1096-1097). The stock, therefore, was "barren" and they knew it was barren, and are not entitled to derive contrary to their agreement any profit from it. Hubbell testified, "I stated very clearly that I am in charge of that property (meaning the terminal property); I know all about it, manage it, buy all the material. I decide on the location of every track, side tracks and main line, changing of the tracks, everything in reference to the details of the business" (Record, pp. 1200-1201).

The son testified:

"Q. Did you or your father, or together as a firm, own and deal in real estate located near the lines of the Des Moines Union?

"A. Yes, sir; F. M. Hubbell has bought considerable lands along the Des Moines Union, and I have, also. I am a trustee in his estate.

"Q. Well, didn't you and your father make a large sum of money in those real estate transactions?

"A. The real estate which we have bought and held I think has gone up in value very considerably.

"Q. You have made plenty of money out of that that you have sold, haven't you?

"A. I do not recall ever having sold any at

a loss, because property has always advanced in Des Moines; I mean, as a general rule (Record, pp. 1198-1199).”

The Hubbells own the Des Moines Terminal Company and the Des Moines Western Terminal Company, which also own terminal railroad properties in Des Moines, and the Hubbells operate them for their own profit in connection with the operation of the Des Moines Company (Record, pp. 1200-1201).

It is respectfully submitted the question sought to be reviewed by petitioners is not an open one and that the petition should be denied.

Respectfully submitted,

JAMES L. MINNIS,

*Counsel for Respondent Wabash  
Railway Company.*

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JAMES D. WALKER,

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, A. D. 1918.

No. 8267

THE DES MOINES UNION RAILWAY COMPANY,  
FREDERICK M. HUBBELL, FREDERICK C. HUB-  
BELL and F. M. HUBBELL & SON,

*Petitioners,*

*vs.*

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY  
COMPANY and THE WABASH RAILROAD COM-  
PANY,

*Respondents.*

**REPLY TO CROSS-PETITION FOR WRIT OF CERTIORARI.**

JOHN C. COOK,  
BURTON HANSON,

*Counsel for Respondent, Chicago Mil-  
waukee & St. Paul Railway Com-  
pany.*

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, A. D. 1918.

\_\_\_\_\_  
**No.** \_\_\_\_\_  
\_\_\_\_\_

THE DES MOINES UNION RAILWAY COMPANY,  
FREDERICK M. HUBBELL, FREDERICK C. HUB-  
BELL and F. M. HUBBELL & SON,

*Petitioners,*

*vs.*

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY  
COMPANY and THE WABASH RAILROAD COM-  
PANY,

*Respondents.*

\_\_\_\_\_  
**REPLY TO CROSS-PETITION FOR WRIT OF  
CERTIORARI.**

\_\_\_\_\_  
The objection to the issuance of a writ of certiorari on the cross-petition herein may be briefly stated as follows: That the question involved is not of sufficient gravity and importance, nor sufficiently open to controversy, to call for the interposition of this court in granting the writ.

Two causes of action are involved in this litigation:

*The first cause of action* (Rec., 55-106 and 117) involves the right of the St. Paul Company, which owns

and operates more than 10,000 miles of railway, and of the Wabash Company, which owns and operates about 2,500 miles of railway, to continue to occupy and use in connection with their systems of railway, as they have for many years last past, about three miles of main line double track, including a bridge over the Des Moines River, and about 27 miles of side and switch tracks, team and warehouse and industry tracks, and a modern passenger depot and freight houses, all located in the center of business and population in the City of Des Moines, the commercial center of Iowa, having a population of about 125,000. This cause of action is called in the opinions of the court below *The Main Controversy*. (Rec., 2088.) That this cause of action or controversy involves questions of large public interest—and, therefore, questions of gravity and importance, and is sufficiently open to controversy—is clearly shown by the opinion of Judges Stone and Smith and the dissenting opinion of Judge Hook in the court below. (Rec., 2086-2120.)

*The second cause of action* (Rec., 106-113) relates wholly to the matter of accounting during the life of the operating agreement, which expired May 1, 1918, and involves merely the question of the ownership of certain funds in the treasury of the Des Moines Company. This cause of action in the opinions of the court below is called *Surplus Earnings*. (Res., 2115.) The court below—all judges concurring—held that these funds belong to the St. Paul and Wabash Companies. (Rec., 2115-2119 and 2120.) No public interest is involved in this cause of action, nor is there involved any rule or principle of law which the interest of the public requires this court to determine, and the cross-petition herein makes no such claim. The only reason assigned for the writ is that if the first cause of action, or main controversy, is to be reviewed here, then the second cause of action

should also be reviewed, regardless of the difference in the subject matter and the questions involved. It seems too plain for argument that each cause of action must be dealt with on its own merits, and that as the second cause of action or branch of the suit involves private interests only, and the decision of the court below in respect thereof being unanimous, and no rule of law on which there are conflicting decisions in the different circuits being involved, a writ of certiorari should not be granted for the purpose of reviewing that decision. If the controversy in this litigation had been confined to this single cause of action, and had been decided by the Circuit Court of Appeals as it was decided, there would be no grounds for granting the writ. Aside from this objection, this cause of action, as will be seen by reading the opinions of Judges Stone and Hook, was correctly decided by the court below and the question involved therein—whether the so-called “surplus earnings” belong to the St. Paul and Wabash Companies, as the court below held they do or to the Des Moines Company—is not sufficiently open to controversy to call for a review thereof by this court.

In addition to the facts stated in the opinions of the court below, we call attention to the following: In Section One of the operating agreement (Rec., 480), the Des Moines Company agreed “*to erect and furnish for the use of the parties of the second part (the railways), in said City of Des Moines, a union passenger depot, and such additional switches, sidings, freight depots and roundhouses, shops, water tanks and yard appurtenances.*” A considerable portion of the so-called “surplus earnings” arose from the renting of rooms and space in this passenger depot, the use of which belonged to the railways, and on the full cost of which the railways paid interest, taxes, insurance and the cost of repairs and



maintenance. Other portions of such surplus earnings were received from switching that was done with engines acquired at the cost of the railways. Every dollar expended in maintaining and operating these engines and in doing this switching service was borne by the railways and charged to them each month. The receipts from such rentals and switching, when collected, were credited on the monthly bills of the Des Moines Company against the railways "*from the time there were any such earnings.*" (Rec., 327.) The first appearance of any such earnings was a small amount in the month of December, 1889. (Rec., 273.) This was nearly a year after the operating agreement had been executed, and nearly two years after the Des Moines Company took charge of the terminal property. These rentals and earnings arising subsequent to the making of the operating agreement, had there been any dispute concerning their ownership or disposition, might well have called into play the provisions relative to arbitration between the parties found in Section 28 of that agreement. (Rec., 487.) But no dispute arose over them, as it was conceded by all concerned that they should go into the monthly accounts between the Des Moines Company and the railways as a credit on operating expenses in favor of the railways. This was in line with the action of the executive and accounting officers of the Des Moines Company (Rec., 272-313), the formal resolution of the board of directors of that company (Rec., 497), and, as the court below decided, was in full accord with the spirit of the operating agreement. It is significant that the resolution of the board of directors of the Des Moines Company was adopted long after the executive and accounting officers had given the railway companies credit for these receipts on their monthly expense bills. (Rec., 497.)

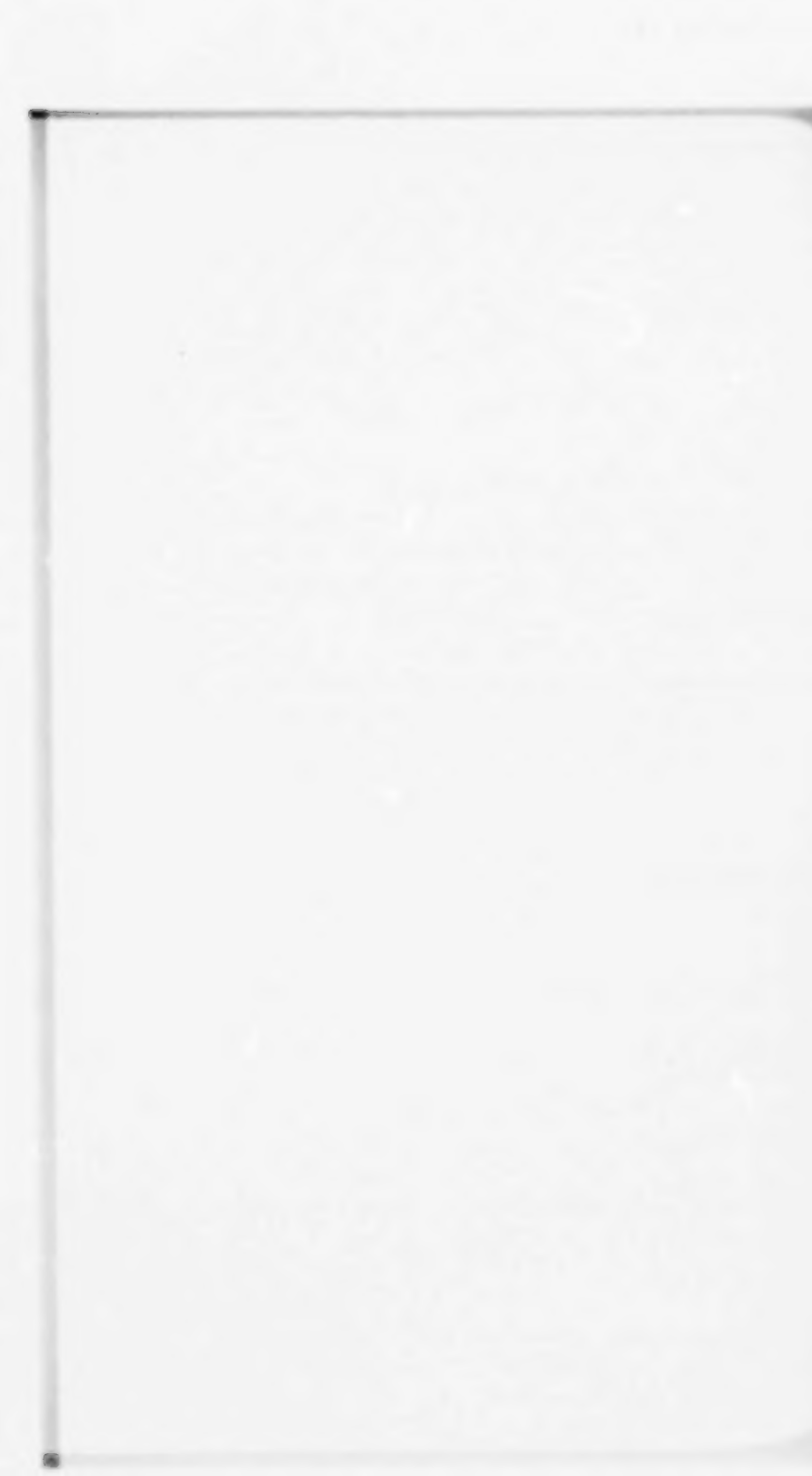
It is respectfully submitted that no grounds exist for granting the cross-petition herein for a writ of certiorari.

JOHN C. COOK,

BURTON HANSON,

*Counsel for Respondent, Chicago,*

*Milwaukee & St. Paul Railway Company.*



IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1919.

No. [REDACTED] 66

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COM-  
PANY AND WABASH RAILWAY COMPANY,

*Petitioners,*

DES MOINES UNION RAILWAY COMPANY, F. M.

HUBBELL, *et al.*, *Respondents.*

No. [REDACTED] 67

DES MOINES UNION RAILWAY COMPANY, F. M.

HUBBELL, *et al.*, *Petitioners,*

*vs.*

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COM-  
PANY AND WABASH RAILWAY COMPANY,

*Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT.

**BRIEF AND ARGUMENT OF CHICAGO, MILWAUKEE & ST.  
PAUL RAILWAY COMPANY AND WABASH RAILWAY  
COMPANY.**

JOHN C. COOK,

BURTON HANSON,

*Counsel for Chicago, Milwaukee & St.  
Paul Railway Company.*

WINSLOW S. PIERCE,

LAWRENCE GREER,

ROBERT J. CARY,

F. C. NICODEMUS, JR.,

*Counsel for Wabash Railway  
Company.*

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IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, A. D. 1919.

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No. 278.

Chicago, Milwaukee & St. Paul Railway Company and  
Wabash Railway Company,

*Petitioners,*

*vs.*

Des Moines Union Railway Company, Frederick M. Hub-  
bell, Frederick C. Hubbell and F. M. Hubbell & Son,

*Respondents.*

---

No. 279.

Des Moines Union Railway Company, Frederick M. Hub-  
bell, Frederick C. Hubbell and F. M. Hubbell & Son,

*Petitioners,*

*vs.*

Chicago, Milwaukee & St. Paul Railway Company and  
Wabash Railway Company,

*Respondents.*

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WRITS OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE  
EIGHTH JUDICIAL CIRCUIT.

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BRIEF AND ARGUMENT OF CHICAGO, MILWAU-  
KEE & ST. PAUL RAILWAY COMPANY AND  
WABASH RAILWAY COMPANY.

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STATEMENT OF THE CASE.

---

The petitioners, Chicago, Milwaukee & St. Paul Rail-  
way Company, called the "St. Paul Company," and

The Wabash Railroad Company, called the "Wabash Company" and also referred to in the brief and argument herein as complainants filed their bill in the District Court of the United States for the Southern District of Iowa, against Des Moines Union Railway Company, called the "Des Moines Company," Frederick M. Hubbell, Frederick C. Hubbell and F. M. Hubbell & Son, called "the Hubbells," and also referred to in the brief and argument herein as the defendants, to establish their right as equitable tenants in common to the joint and exclusive use in perpetuity of the terminal facilities and property in the City of Des Moines, Iowa, held in the name of the Des Moines Company, and for an accounting of large sums of money, called "surplus earnings," collected from time to time by the Des Moines Company and the Hubbells for the use of such terminal facilities and property. (Rec., 53, 119.)

The railroads and terminal facilities in controversy include a double track railroad extending from a connection with the railroad of the Wabash Company at its terminus at the east limits of the City of Des Moines through the business center of the city over a bridge across the Des Moines River to a connection with the tracks of the railroad of the St. Paul Company at its terminus at Sixteenth street near the western limits of the city, a distance of about three miles; modern passenger depot, freight depot, sidetracks, switches, roundhouses, turntables and industry tracks connecting with all industries of importance in Des Moines, together with switch engines and other incidental facilities. (Rec., 183, 480, 1047.) The original outlay for the ground and rights of way was \$461,257 and F. M. Hubbell estimated the value of the property at \$2,000,000. (Rec., 478; 1094.) The surplus earnings at the time of the filing of the bill amounted to approximately \$500,000. (Rec., 109, 194.)

The Hubbells claim that the complete title to and ownership of the terminal property and surplus earnings is in the Des Moines Company, and as holders of 2,500 shares out of the total of 4,000 shares of the capital stock of that company—1,000 shares of the remainder thereof being owned by the St. Paul Company and 500 shares by the Wabash Company—they have asserted the right to exclude the petitioners from the use of such terminal facilities at the expiration of a supplemental operating agreement, namely, on May 1, 1918, and to distribute such surplus earnings among the holders of such capital stock pro rata. (Rec., 329, 333.)

#### THE BILL.

The bill of complaint as amended avers, among other things, that three railway companies—Des Moines & St. Louis Railroad Company, called "St. Louis Company," Des Moines Northwestern Railway Company, called "Northwestern Company," and St. Louis, Des Moines and Northern Railway Company, called "Northern Company"—predecessors in title to the St. Paul Company and the Wabash Company, acquired terminal property in the City of Des Moines and constructed thereon railroad tracks, switches, sidetracks, turnouts, depots and other terminal facilities for their joint use and occupancy; that pursuant to a contract dated January 2, 1882, said Railway Companies created the Des Moines Company and conveyed to it the terminal property so acquired subject to the joint use and occupation thereof in perpetuity, which use and occupation they reserved to themselves, their successors and assigns; that thereafter additional property was from time to time conveyed to the Des Moines Company, subject to such joint use and occupation; that the articles of incorporation of the Des Moines

Company provided, among other things, that all powers exercised by that company should be in accordance with the terms and spirit of the contract of January 2, 1882; that the affairs of that company should be managed by a board of directors to be nominated by the three Railway Companies, their grantees or assigns, and that the Des Moines Company should act as the agent of the three Railway Companies in operating, financing and developing such terminal property and facilities for their use and benefit; that on May 10, 1889, the Des Moines Company and the three Railway Companies entered into an agreement supplemental to the contract of January 2, 1882, defining in detail the relations and duties of the Railway Companies to each other and to the Des Moines Company in the enjoyment of such joint use and occupation of the terminal facilities and property for a period expiring *May 1, 1918*; that the Des Moines Company collected and received from time to time, for the use of such terminal facilities and property by others, income aggregating approximately \$500,000, called surplus earnings; that the Hubbells unlawfully obtained control of the Des Moines Company by usurping its offices, and just prior to the commencement of this suit had set up the claim that they owned a large majority of its capital stock, were entitled to elect its directors and officers, and that the Des Moines Company owned such terminated facilities and property in its own right, free from such joint use and occupation thereof by the St. Paul Company and Wabash Company, successors in interest of said three Railway Companies, except the rights conferred upon them by such supplemental agreement of May 10, 1889, and that it, said Des Moines Company, was entitled to receive and retain in its own right such surplus earnings so as aforesaid collected from others for the use of such terminal facilities and property.

The bill, besides praying for general relief, prays, among other things, that after May 1, 1918, it be declared that the St. Paul Company and the Wabash Company as successors and assigns of the three Railway Companies, are entitled to the joint and exclusive use in common and in perpetuity of such terminal facilities and property, on the terms stated in the contract of January 2, 1882; that the Hubbells be restrained from interfering with, or obstructing, such use; that the amount of such surplus earnings so collected and received from the use of such terminal facilities and property by others be ascertained and that the Des Moines Company be required to pay the same to the St. Paul Company and the Wabash Company. (Rec., 53, 119.)

#### THE ANSWER.

The answer to the bill admits in substance the making and execution of the January 2, 1882, contract, the incorporation of that contract in the articles of incorporation of the Des Moines Company, that the various persons who had held title to property under that contract had conveyed the same to the Des Moines Company, but denies that such conveyances were made to that company as trustee, and avers that that company owned said property in its own right.

The answer also admits that the Hubbells have asserted the claim that upon the expiration of the supplemental agreement, May 1, 1918, the right of the St. Paul Company and the Wabash Company to use such terminal facilities and property will cease, and that if they should desire to use such terminal facilities and property thereafter, they could do so only under such contract as might be made therefor.

The answer also admits that the Des Moines Company

had received for the use of such terminal facilities and property by others income aggregating a large sum.

The answer denies that the St. Paul Company and Wabash Company, or either of them, have any right in such terminal facilities and property except such rights as were acquired under the supplemental agreement of May 10, 1889, or that said companies, or either of them, have any interest in, or right to, the surplus earnings so as aforesaid received by the Des Moines Company for the use of said terminal property and facilities by others. (Rec., 174-196.)

#### SUCCESSION OF ST. PAUL COMPANY AND WABASH COMPANY.

Wabash *Railway* Company, herein called the "Wabash Company," on July 1, 1916, succeeded to the title of the railway, property and franchises theretofore belonging to The Wabash *Railroad* Company, the original complainant in this bill, and was by order duly entered herein substituted in place of The Wabash *Railroad* Company as party complainant in this bill. (Rec., 2053.) The Wabash *Railroad* Company succeeded to the title of the railway, property and franchises of the Wabash *Western Railroad* Company, which latter company succeeded to the title of the railway, property and franchises of the St. Louis Company and of the Wabash, St. Louis & Pacific Railway Company. (Rec., 530-534.)

The St. Paul Company is the remote successor of the Northwestern Company and the Northern Company, the two companies last named having in 1891 consolidated under the laws of Iowa under the name of Des Moines Northern & Western *Railway* Company. (Rec., 694.) Thereafter, by foreclosure and sale, the railway, property and franchises of the last named company were acquired by the Des Moines Northern & Western *Railroad*

Company, and this last named company in February, 1889, conveyed all its railway, property, franchises, rights and interests to the St. Paul Company. (Rec., 673.)

The St. Paul Company having succeeded to all the property, rights, interests and privileges of the Northwestern Company and the Northern Company, and the Wabash Company having succeeded to all the property, rights, interests and privileges of the St. Louis Company, they likewise succeeded to all the property, rights, interests and privileges of the parties to the January 2, 1882 contract and to all the property, rights, interests and privileges of the St. Louis Company, the Northwestern Company and the Northern Company in the supplemental agreement of May 10, 1889. Ever since such succession by the St. Paul Company and Wabash Company, they have used the terminal properties in Des Moines under said contract of January 2, 1882, and said supplemental agreement of May 10, 1889, and such succession and use of the terminal properties in Des Moines have been recognized by the Des Moines Company and the Hubbells. Neither of said railway companies nor any of their predecessors ever had or now has access or entrance to the City of Des Moines except over the terminal properties in controversy.

#### DECREE OF THE DISTRICT COURT.

The decree of the District Court adjudged

(a) That the Des Moines Company was organized for the purpose of furnishing terminal services to the St. Paul Company and the Wabash Company and their predecessor Railway Companies, and acquired the terminal property and facilities for that purpose; that such corporate obligation still exists in their favor and is absolute and paramount to any obligation of the Des Moines Company to serve other railway companies, and that after May 1, 1918—the

termination of the supplemental agreement of May 10, 1889—if the parties in interest are unable to agree upon the terms under which the St. Paul Company and the Wabash Company might continue to use such terminal property and facilities, the court, upon application, would fix the same.

(b) That the Des Moines Company is the absolute owner of the so-called surplus earnings, and that the St. Paul Company and the Wabash Company have no interest therein except such as accrued to them as stockholders of the Des Moines Company. (Rec., 2065.)

The St. Paul Company and the Wabash Company appealed from the entire decree to the United States Circuit Court of Appeals for the Eighth Circuit. (Rec., 2068.) The Des Moines Company and the Hubbells appealed from that part of the decree set out in paragraph “(a)” above. (Rec., 2077.)

#### DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS

The decree of the Court of Appeals adjudged

(a) That the decree of the District Court should be modified so as to state that the complete title of the terminal property and facilities was in the Des Moines Company; that the only interest of the St. Paul Company and the Wabash Company in such property and facilities, or in the management of the Des Moines Company, is such as flows from their ownership of stock of the Des Moines Company. (Rec., 2127.) *Hook, Circuit Judge, dissented as to this portion of the decree.* (Rec., 2021.)

(b) That the so-called surplus earnings belong to the St. Paul Company and the Wabash Company, and that a master should be appointed under instructions to ascertain the part due to each company upon a wheelage basis. (Rec., 2127.) *Hook, Circuit Judge, concurred in this portion of the decree.* (Rec., 2021.)



## WRITS OF CERTIORARI.

The St. Paul Company and the Wabash Company petitioned this Court for a writ of *certiorari* to review the record in respect of that part of the decree of the United States Circuit Court of Appeals which adjudged that the complete title to the property and terminal facilities is in the Des Moines Company, and that the only interest of the St. Paul Company and the Wabash Company in such property and facilities or in the management of the Des Moines Company is such as flows from their stock ownership in the Des Moines Company. The Des Moines Company and the Hubbells petitioned this Court for a writ of *certiorari* to review the record in respect of that part of the decree of the United States Circuit Court of Appeals which adjudged that the so-called surplus earnings belong to the St. Paul Company and the Wabash Company. Both petitions were granted by this Court, and this case is here in response to these writs of *certiorari*. As the so-called surplus earnings branch of this case involves no public interest and no rule or principle of law which public interest requires this Court to determine, and as the decision of the Court of Appeals thereon was unanimous, presumably this branch of the case is here because the other branch, or the main controversy in the case, was brought here. Indeed, this was the ground of the Hubbells' petition.

## QUESTIONS INVOLVED.

The underlying questions are:

- (a) Whether the Des Moines Company holds the title to the terminal property in trust for the St. Paul and Wabash Companies as equitable tenants in common therein and subject to their joint use and occupation upon the

terms described in the contract of January 2, 1882, with the result that following the expiration of the Supplemental Agreement on May 1, 1918, the St. Paul and Wabash Companies were, and are, remitted to the rights and obligations of that contract, as held by Judge Hook in his dissenting opinion, or whether the title to the terminal property is absolute and complete in the Des Moines Company, and the St. Paul and Wabash Companies' only interest therein is such as flows from stock ownership, as held by the majority opinion; and

(b) Whether the St. Paul and Wabash Companies are entitled to the so-called Surplus Earnings, as adjudged by the Circuit Court of Appeals—all the judges concurring.

The questions in paragraph (a) are raised by the following specification of error:

#### SPECIFICATION OF ERROR RELIED UPON.

*The court below—Circuit Court of Appeals—erred in holding that the Railway Companies have parted with the exclusive ownership and control of the terminal property which they had reserved to themselves under the January 2, 1882 contract, and that the complete title to this property is in the Des Moines Company, and that the only interest of the St. Paul Company and the Wabash Company in such property, or in the control and management thereof or of the Des Moines Company, is such as flows from stock ownership. (Rec., 2114, 2118.)*

STATEMENT OF FACTS.

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It is not questioned by any of the parties in interest to this proceeding that the transactions and events out of which has grown the present controversy began with the existence of a trust under which the predecessor Railway Companies of the complainants were the beneficial owners in the property held by the Des Moines Company.

The majority opinion of the Circuit Court of Appeals assumes as the premise upon which its conclusions are founded the existence of this trust, and the result reached by it is based upon the theory that through inadvertent developments this trust has disappeared. (Rec., 2096, 2102.) This factor of inadvertence in the alleged dissolution of the trust is stated by that Court in the following language:

“There is nowhere any indication that the railways intended any such result and yet such in our judgment is the result. This unexpected outcome was the product of several circumstances.” (Rec., 2113.)

The dissenting judge in the Court of Appeals states that

“The excerpt quoted above touches the quick of this controversy.” (Rec., 2119.)

And in commenting upon it, he says that the conclusions of the majority are of this significance:

“In other words the proprietary companies were not cognizant of the trend of the circumstances and the result held to follow though unexpected and not intended by them, is enforced because of legal presumption of intention of natural consequences of acts, regardless of intention in fact. The circum-

stances relied on do not appear to me to have the significance attributed to them, but were it otherwise, the presumption should not be so broadly applied to the case of a trust, the destruction of which is claimed by those subject to the disabilities of trustees dealing for themselves." (Rec., 2119.)

The several tests of the rights of the parties must all eventually come to the issue disclosed by the above quotations from the majority and minority opinions of the Circuit Court of Appeals.

In such a situation it is believed that the facts of the case can be presented most significantly by classifying them in the following three groups:

I. A statement of those facts which were preliminary to the establishment of the trust and were the inducement for the same.

II. A statement of the terms of the trust and of its development in the corporate form which it eventually took, and in this respect the relation of the defendants Hubbell as the administrators and fiduciaries of the trust.

III. The independent transactions of the Hubbells in respect of the trust property and the several aliquot interests evidenced and measured by shares of stock of the corporate trustee.

### I.

A STATEMENT OF THOSE FACTS WHICH WERE PRELIMINARY TO THE ESTABLISHMENT OF THE TRUST AND WERE THE INDUCEMENT FOR THE SAME.

#### The defendant F. M. Hubbell.

In 1880 the defendant F. M. Hubbell and Jefferson S. Polk were copartners, practicing law, trading in real estate and promoting railroad enterprises in and about the City of Des Moines, Iowa, under the firm name of

Polk and Hubbell. (Rec., 998.) The defendant Hubbell was president of and he and his partner Polk and two associates, J. S. Clarkson and J. S. Runnells, were the stockholders of the Narrow Gauge Railway Construction Company, a contracting company which had constructed certain railroad mileage in the vicinity of Des Moines. (Rec., 407, 408; 998.)

*The railroad situation at Des Moines in 1880.*

At this period the Wabash, St. Louis and Pacific Railway Company, referred to in the pleadings as the original Wabash Company, owned and operated a system of railways lying east and west of the Mississippi River, including a line extending from St. Louis to Albia, a point in the State of Iowa about 67 miles southeast of the City of Des Moines. (Rec., 998.) Polk and Hubbell being interested in a narrow gauge railroad partly constructed to the northwest of Des Moines from Waukee to Adel, a distance of about 7 miles, sought to interest the Wabash Company in the construction of new railroad mileage in and about the City of Des Moines, including the completion and development of the partially constructed road, of which they were the owners. (Rec., 998, 1001.)

The projected railroad construction in which Polk and Hubbell sought to interest the Wabash Company, may be roughly indicated by the letter Y. The stem of the Y represents a proposed extension of the road of the Wabash Company from Albia to Des Moines; the left arm of the Y a line extending northwesterly from Des Moines to Fonda, of which 7 miles of railroad between Waukee and Adel had already been constructed under the charter of a corporation controlled by Polk and Hubbell and known as the Des Moines Northwestern Railway

Company, hereafter referred to as the "Northwestern Company." The right arm of the Y represents a further projected line to extend in a general northerly direction from Des Moines to the Town of Boone.

A blue print of these roads as subsequently constructed appears in the record at page 197.

As the three projected roads converged at Des Moines, it was also proposed that proper terminals and terminal facilities in Des Moines be acquired for their joint and common use. (Rec., 412, 1001.)

The contracts with the defendant Hubbell and his associated interests.

On December 8, 1880, the defendant F. M. Hubbell, his partner Jefferson S. Polk and J. S. Clarkson and J. S. Runnells, being the same parties who owned and controlled the capital stock of the Narrow Gauge Railway Construction Company, entered into a contract with the Wabash Company providing for the construction of a line in extension of the line of that company along the stem of the Y from Albia to Des Moines, this line to be constructed at the cost of the Wabash Company in the name of the St. Louis Company, a corporation which the defendant Hubbell and his associates contracted to organize. This contract provided in substance that the defendant Hubbell and his associates would incorporate the St. Louis Company with a capital stock of two million dollars and authorized to construct a railroad from Des Moines, Iowa, to Albia in said state. They were to give their time, personal attention to and act as directors and officers of this enterprise, so far as necessary to locate and economically construct the railroad, but subject to the approval of the Wabash Company. They were personally to exert

themselves to procure subsidies in aid of the line and donations of lands, stations, right of way and other benefits in aid of its construction. They were to receive as compensation for their services, in all of the above respects from the time of the execution of the contract made by them to the completion of the railroad, the sum of \$10,000 in money and a further sum of five per cent of the amount of all subsidies which should be actually paid, and five per cent of the value of donations in lands for right of way or station purposes and five per cent of the value of all other aid to the construction of the railroad accepted by the Wabash Company. (Rec., 396.)

The contract also provided that the defendant Hubbell and his three associates should each subscribe for one share of the stock, and that the balance of the stock should be subscribed for by a nominee of the Wabash Company, who should undertake to make payment of his subscription by constructing the proposed railroad. (Rec., 398.) James F. How became the nominee of the Wabash Company, and so subscribed for the balance of the stock, and the road was constructed by the Wabash Company in his name as contractor. (Rec., 999.)

On the same date with that of the above contract, namely, December 8, 1880, the line hereinbefore mentioned as controlled by Hubbell and his associates, namely, the Northwestern Company and a corporation named the Narrow Gauge Railway Construction Company, also owned and controlled by the same parties, entered into a contract with the Wabash Company, providing for the completion of the line of the Northwestern Company along the left arm of the Y from Des Moines to Fonda. This contract provided that the line should be constructed by the Construction Company in consideration of \$7,000 per mile of bonds of the Wabash

Company, to be secured in part by a mortgage given by the Northwestern Company upon the proposed road, the stock of the Northwestern Company to be equally divided between the Construction Company representing Hubbell and his associates, and the Wabash Company. (Rec., 400.)

The contract also provided that, in order to supply the Construction Company with funds, the Wabash Company would purchase the mortgage bonds deliverable to the Construction Company on the basis of 95 per cent of their par value. (Rec., 406.) This formality was not followed, but the Wabash Company, instead of actually delivering the bonds to the Construction Company, provided it with funds direct by selling the bonds in the market. (Rec., 1001.)

No contract covering the construction of the line northwardly from Des Moines to Boone, along the right arm of the Y, appears in the record, the financing of this road having been undertaken by Gen. Grenville M. Dodge, as an independent enterprise. However, the actual construction work was performed by the Narrow Gauge Construction Company, which company operated from the office of Polk and Hubbell in the City of Des Moines. (Rec., 1170, 1180.)

*The corporate organization of the three railway companies mentioned above.*

On December 15, 1880, Polk, Clarkson, Runnells and Hubbell, in pursuance of the contract first mentioned above, incorporated the St. Louis Company under the laws of Iowa, for the purpose of constructing the proposed line along the stem of the Y from Albia to Des Moines. (Rec., 408.) Hubbell was made secretary of



the company and also a director, and held both positions until 1891. (Rec., 1297.)

On December 23, 1880, the same four individuals, pursuant to the contract last above mentioned, reincorporated said Northwestern Company for the purpose of completing the line along the left arm of the Y from Des Moines to Fonda (Rec., 725.) Hubbell was made treasurer of the company and also a director of the same, and served continuously in both capacities until the reorganization of said company in 1886, except in 1880, when he served as its assistant treasurer. (Rec., 1279.)

On April 4, 1881, the same four individuals, pursuant to an arrangement with said Dodge, incorporated the St. Louis, Des Moines and Northern Railway Company, hereinafter referred to as the "Northern Company," for the purpose of constructing the third line along the right arm of the Y from Des Moines to Boone. (Rec., 728.) Hubbell was made a director of the company and served in this capacity until 1890; he also served as treasurer of the company until 1883. (Rec., 1297.)

#### The construction work.

The actual construction work of the three lines, as well as the assembling the necessary terminal railways and facilities at Des Moines, proceeded actively during the year 1881.

The work on the line of the St. Louis Company was under the direction of James F. How, the subcontractor above referred to, designated by and representing the Wabash Company. (Rec., 419, 1001.)

The work on the lines of the Northwestern Company and of the Northern Company was under the direction of the Narrow Gauge Construction Company, and the

operations were conducted from the office of Polk and Hubbell. (Rec., 1170.)

The assembling of the terminal railways and facilities in Des Moines was also conducted from the office of Polk and Hubbell and was under the personal direction of Hubbell himself. (Rec., 981, 1181.) Hubbell also negotiated the purchase of all the real estate, and where condemnation proceedings were necessary these were conducted by Parsons and Runnells, attorneys for the Wabash Company at Des Moines. (Rec., 1001, 1002.)

The funds for the purchase and acquisition of real estate and other property were advanced by the Wabash Company and Gen. Grenville M. Dodge.

Such of the real estate acquired as was charged to the St. Louis Company, or to the Northwestern Company, was paid for by the Wabash Company and title to the same was taken in the name of James F. How individually or of James F. How, trustee, or was taken in the name of other individuals in the first instance and subsequently transferred to How in one of the above capacities.

Such of the real estate as was charged to the Northern Company was paid for by Dodge and the titles were taken in his name.

Certain property being largely property acquired as the result of condemnation proceedings, was taken in the names of either the St. Louis Company or the Northern Company. (Rec., 1045, 1181.)

At the close of the year 1881, the road of the Northwestern Company was opened for operation, and its trains were running into the Des Moines terminals, and the two other roads were well advanced. (Rec., 1053.) But no formal contract had yet been made for the per-

manent ownership and operation of the terminals, that is to say, the terminal development was still proceeding under the parol understanding dating back to the inception of the enterprise.

Thus, at this point, the following situation had developed:

The legal title to certain of the properties was in the Northern Company, which it had acquired by condemnation proceedings; the legal title to certain other property was in the St. Louis Company, which it had also acquired by condemnation proceedings; the remaining property was in the title of certain individuals, namely, Dodge and How, without specification of the terms of the trust, but the beneficiaries of the trust were the three railway companies, by or on whose behalf all of the above referred to properties had been acquired and which had provided the money for the acquisition thereof.

It therefore appears that operation had already begun on the terminal properties before any permanent plan for the proper holding of such properties for railroad purposes had been determined upon by the beneficiaries of the trust enterprise.

## II.

**A STATEMENT OF THE TERMS OF THE TRUST AND OF ITS DEVELOPMENT IN THE CORPORATE FORM WHICH IT EVENTUALLY TOOK, AND IN THIS RESPECT THE RELATION OF THE DEFENDANTS HUBBELL AS THE ADMINISTRATORS AND FIDUCIARIES OF THE TRUST.**

As a result of the situation summarized at the conclusion of the foregoing subdivision, the parties to the enterprise entered into a certain contract which created the express trust lying at the foundation of this suit.

The contract of January 2, 1882 (Rec., 411).

This contract was made between the St. Louis Company, the Northwestern Company and the Northern Company as the beneficial owners of the terminal properties and G. M. Dodge, James F. How and James F. How, trustee, as the holders in trust of the legal titles to certain of the terminal properties. The Wabash Company also subjoined its consent to the execution of the agreement by the St. Louis and Northwestern Companies.

This contract states:

(1) That the three companies—St. Louis Company, Northwestern Company and Northern Company—are engaged in the construction of railways converging at Des Moines, and had theretofore agreed upon the purchase, construction and maintenance of terminal facilities at Des Moines, at their joint expense, *and that such terminal facilities should be held and used in common as provided in said contract.* (Rec., 412.)

(2) That in pursuance of the agreement theretofore made various purchases had been made of property in Des Moines in the name of the St. Louis Company, James F. How individually and as trustee, and Grenville M. Dodge, and the construction of buildings and other improvements upon the property so purchased had been commenced. (Rec., 412.)

(3) That the expense incurred by such purchases and improvements, and such others as might thereafter be made, should be borne one-half by the St. Louis Company, one-quarter by the Northwestern Company, and one-quarter by the Northern Company. (Rec., 412.)

(4) That it was understood that a "*Depot Company*" might be organized to take permanent charge of the

terminal property upon the terms set forth in the contract, and that said "*Depot Company*" might issue and deliver to the three railway companies its mortgage bonds to the amount of their respective portions of the cost of said purchases and improvements. (Rec., 412.)

(5) That the title to said terminal property should be and remain in a trustee to be named by the three railway companies "*but subject to the joint use and occupation of all of said Railway Companies upon the terms herein described.*" (Rec., 412.)

(6) That How and Dodge declare that their purchases of property were "*made in their names upon the trusts above referred to, and agree to quitclaim and convey the same to said TRUSTEE upon demand and reimbursement.*" (Rec., 413.)

(7) That the St. Louis Company shall be charged with the police control, supervision and maintenance of the terminal property, and the expense thereof to be apportioned between it and the Northwestern and Northern Companies upon a wheelage basis. (Rec., 413.)

(8) That spur tracks shall be built connecting the terminal property or grounds with factories and other sources of trade in Des Moines, which tracks shall be adapted for use for both broad and narrow gauge tracks. (Rec., 413.)

(9) That in the event that any company whose railroad does not extend to Des Moines shall effect an arrangement for running its trains into Des Moines over the railroad of the St. Louis Company, the Northwestern Company or the Northern Company, such company shall be entitled to the use of all of the terminal facilities upon the payment of a fair sum for rental and its proportion of maintenance, and that railroad companies

whose roads extend to Des Moines may be admitted to the use of such terminal facilities by agreement of all said companies. (Rec., 413-414.)

(10) That the grounds or terminal property to be held in common by the St. Louis Company, Northwestern Company and Northern Company under such contract are all east of Farnum street in the City of Des Moines. (Rec., 414.)

Speaking of this contract, Judge Stone, who wrote the majority opinion in the Court of Appeals, says:

(a) "An analysis of this contract shows a statement of the occasion and object of the contract, provisions for the title, the use and occupation, the maintenance and improvement of the property." (Rec., 2091.)

(b) "As to the companies (Railways), the contract not only declared some existing property rights, but attempted to define for the future the rights of title and usage of the terminal property. *The title contemplated was a trust.* The legal title to be 'in a trustee to be named by agreement of said companies.' The beneficial estate to be in the three companies in proportion to the parts each contributed to the payment therefor. While this proportional interest is not set forth in so many words, it is necessarily inferred from the combined circumstances that the companies were to pay therefor and for improvements thereto in proportion of one-half, one-fourth and one-fourth." (Rec., 2096.)

(c) "*The contract terms and intent as to ownership were a trust.*" (Rec., 2102.)

In connection with the foregoing, particular attention is directed to the third article of the agreement, providing that a "Depot Company" might be organized to take charge of the terminals, the same to be transferred to the Depot Company in such form of title as would permit it to mortgage the property as security for its bonds, and also to the second and fourth articles of the agree-

ment providing that the title to the terminal properties shall be and remain in a trustee to be designated by the parties, but subject to the use and occupation of the terminals by the three beneficiary railway companies.

Following the execution of this contract, the parties in interest continued the work of completing the three railway lines, the making of improvements of the terminal property at Des Moines by the construction of necessary buildings and facilities, the purchase of additional property, obtaining franchises, and connecting the tracks of the St. Louis Company, which were broad gauge, with the tracks of the Northwestern and Northern Companies, which were narrow gauge, by laying a third rail alongside of the rails of each of the three companies through the terminal property.

*It is to be further noted that the enterprise was subsidized by aid voted by various counties through which the lines of the St. Louis, the Northern and the Northwestern Companies extended, and that it received further valuable subsidies in the form of donations of rights of way, among these being a right of way granted by ordinance of the City of Des Moines covering the main line of the terminal railway in the City of Des Moines. (Rec., 443, 788-816, 1049.)*

#### The completion of the railroads

During the years 1882 and 1883, the construction of the two remaining roads was completed. The line of the Northern Company was put into operation in August, 1882, and on January 4, 1883, stockholders of the St. Louis Company adopted a resolution formally accepting its road as completed between Albia and Des Moines. (Rec., 882, 1427.)

The incorporation of the Des Moines Union Railway Company.

On December 9, 1884, the board of directors of the Northwestern Company adopted a resolution reciting that, it having been agreed by the parties to the contract of January 2, 1882 that the property and franchises theretofore acquired, should be used for terminal facilities at Des Moines, it was desirable that a corporation be organized for the purpose of taking and holding such property and "*carrying out the objects of said contract of January 2, 1882,*" and that F. M. Hubbell and others act for this company in the organization of such corporation. (Rec., 415.)

Accordingly on December 10, 1884, representatives of the Northwestern Company, of the St. Louis Company and of the Northern Company met in the City of Des Moines for the purpose of organizing the Depot Company, which the parties had agreed "might be organized to take permanent charge of the terminal property upon the terms set forth in the contract."

Present at the meeting were:

G. M. Dodge, representing himself and the Northern Company.

J. S. Polk and F. M. Hubbell, representing the Northwestern Company.

John S. Runnells and C. F. Meek, representing the St. Louis Company, and

James F. How, both as trustee and in his individual capacity.

The first action of this meeting was the adoption of the following resolution:

*"Resolved, That for the purpose of carrying out*



*the objects and purposes of the agreement heretofore, to wit, on the second day of January, 1882, made and entered into by and between the Des Moines & St. Louis Railroad Company and others (which is set out in full in the following Articles of Incorporation), the following be adopted as the Articles of Incorporation of the Des Moines Union Railway Company, to wit:"* (Rec., 416.)

Following this resolution, articles of incorporation of the Des Moines Company were adopted which were preceded by the following:

"WHEREAS, The Des Moines & St. Louis, the Des Moines Northwestern and the St. Louis, Des Moines & Northern Railway Companies have been engaged in the construction of railways converging at Des Moines, Ia., and have secured certain franchises, purchased certain realty and made certain improvements thereon—which they have heretofore agreed should be secured, purchased, made and maintained upon certain agreed conditions, at their joint expense—in accordance with a contract made and entered into by and between said companies and Grenville M. Dodge and James F. How, trustee, bearing date January 2nd, A. D. 1882, and which contract is in words and figures as follows, to wit:

(Here follows the contract of January 2, 1882, *verbatim et literatim.*)

"WHEREAS, each of said railway companies and said parties has expended large sums of money in purchasing and improving the property aforesaid, and in the construction of suitable buildings for the use of said companies, and

WHEREAS, it was provided in the contract aforesaid that a depot company might be organized to take permanent charge of the property, and it was the understanding of the parties that such company might acquire, operate and maintain said property in such manner as best to serve the interest of the parties hereto.

NOW, THEREFORE, for the purposes aforesaid, as well as for those hereinafter expressed, the under-

signed hereby associate themselves in a body corporate, and adopt the following:

Articles of Incorporation." (Rec., 416-419.)

These articles, besides stating the name of the corporation, its principal place of business, the names of the officers and the first board of directors, the manner of calling meetings of the board of directors, the method by which the articles might be amended, and the term of the corporation, provided:

(1) That the nature of the business to be transacted by the "*Depot Company*" shall be the construction, ownership and operation of a railway in, around and about the City of Des Moines, including the construction, ownership and use of depots, freight houses, railway shops, and whatever else may be useful and convenient for the operation of the railways at the terminal point in Des Moines, as well as the transfer of cars from one railway to another, or from factories, warehouses and elevators to each other or to any of the railways in or around Des Moines; the "*Depot Company*" to possess all the powers conferred upon corporations for pecuniary profit under Chapter 1 of Title IX of the Iowa Code and the amendments thereto. (Rec., 420.)

(2) *That all the powers exercised by the "Depot Company" shall be in accordance with the terms and spirit of the January 2, 1882, contract.* (Rec., 420.)

(3) That the "*Depot Company*" shall have the right to lease or otherwise dispose of the use of any part of its franchises to any other railway company, provided the assent in writing of the St. Louis Company, the Northwestern Company and the Northern Company shall be necessary before such lease or disposition can be made to any other than the three companies last named. (Rec., 420.)

(4) That the affairs of the "*Depot Company*" shall be managed by a board of eight directors, four of whom shall be nominated by the Wabash, St. Louis & Pacific Railway Company, two of whom by the Northwestern Company, and two by the Northern Company. This provision applies to any grantee or assignee of either of these companies. (Rec., 421.)

(5) That no contract, lease or other agreement amounting to a permanent charge on the property of the "*Depot Company*" shall be entered into unless the same shall have been first approved by the St. Louis Company, the Northwestern Company and the Northern Company, or their assignees, and shall have been submitted to a meeting of the stockholders and approved by more than three-fourths of all the stockholders, and that no limitation whatsoever upon any of the franchises of the "*Depot Company*" shall be made by its board of directors except the same shall have been submitted to and approved by the stockholders. (Rec., 421.)

(6) That the capital stock of the "*Depot Company*" shall be \$1,000,000, divided into shares of \$100 each, to be paid at such times and in such manner as the board of directors may determine, and the board is authorized to receive in payment of such stock the property and franchises in Des Moines now held by the St. Louis Company, the Northwestern Company, the Northern Company, How and Dodge individually and How as trustee. (Rec., 420.)

The articles bear the signature of F. M. Hubbell, J. S. Polk and J. S. Runnels. (Rec., 422.)

F. M. Hubbell acted as secretary of the meeting which adopted these articles. (Rec., 423.)

Particular note should be given to that provision of

the articles of incorporation above quoted, which reads that:

"All the powers exercised by this company (The Depot Company), shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882." (Rec., 420.)

Particular attention is also called to the article giving a veto power in the management of the affairs of the "*Depot Company*" to each of the beneficiaries of the trust in the following terms:

"No contract, lease or other agreement amounting to a permanent charge upon the property of the corporation, shall be entered into by the board, unless the same shall have been first approved by the Des Moines and St. Louis Railroad Company, the Des Moines, Northwestern Railway Company and the St. Louis, Des Moines and Northern Railway Company, or their assignees \* \* \*." (Rec., 421.)

The resolutions of January 1, 1885.

"Following the incorporation of the Des Moines Company, the stockholders of the St. Louis Company, the Northwestern Company and the Northern Company, at meetings held January 1, 1885, adopted resolutions reciting the execution of the January 2, 1882, contract, and the incorporation of the Des Moines Company December 10, 1884, and declaring:

(a) That each company accepted and ratified, so far as its interests were affected thereby, the articles of incorporation of the Des Moines Company *as in substantial accord and compliance with the terms and conditions of the January 2, 1882, contract*, and undertook to discharge all the obligations imposed upon it by said contract in order to make effective the purposes of the Des Moines Company. (Rec., 424.)

(b) That the proper officers of each company be authorized, upon the issuance to it of the share of bonds and stock of the Des Moines Company to which it might be entitled under the contract, to convey, assign and transfer to the Des Moines Company all its right, title, and interest, of whatever name and nature, in and to the real estate, franchises, choses in action and right in possession or contingent, to all the property in the City of Des Moines east of Farnum street *then held, enjoyed or claimed by either or all the signatories of said January 2, 1882, contract, or any agent or trustee thereof, purchased, acquired or held in pursuance of that contract.* (Rec., 424.)

F. M. Hubbell presented the resolution adopted by the stockholders of the St. Louis Company and the Northwestern Company, and voted for their adoption. (Rec., 423, 426.)

On the same day, January 1, 1885, the first meeting of the board of directors of the Des Moines Company after its incorporation, was held. At this meeting, resolutions were adopted the preambles to which stated that the St. Louis Company, the Northwestern Company, the Northern Company, How both in his individual right and as trustee, and Dodge, had by their officers and by themselves personally notified the Des Moines Company that they had each approved of the organization of the Des Moines Company and had directed their officers and trustees to surrender and deliver to the Des Moines Company the railroad property and franchises mentioned in the contract of January 2, 1882, *and had requested the Des Moines Company to take possession of, and maintain and operate the same for the purposes and on the terms mentioned in the January 2, 1882 contract,* and that said railway companies and individual signa-

tories to that contract had indicated their desire and purpose to transfer the property to the Des Moines Company in accordance with the terms of that contract, and that it was desirable that the Des Moines Company at once should take possession of such property and maintain, control and operate it and procure all necessary conveyances and transfers of the same and make provisions for, and pay for said property so proposed to be conveyed to it. The resolutions declared:

(a) That the Des Moines Company accepted the transfer and management and operation of such property theretofore owned by the St. Louis Company, the Northwestern Company, the Northern Company and others, parties to the January 2, 1882 contract, and assumed control thereof, and instructed its president to make such order as might be necessary to render *such control and management effective as provided in that contract.* (Rec., 433.)

(b) That the officers of the Des Moines Company be appointed a committee to confer with the parties to the January 2, 1882 contract, and agree with them severally upon the terms and price at which they would, respectively, assign, transfer and convey such property and franchises to the Des Moines Company, *and to procure from them, and each of them, such conveyances and transfers as might be necessary to fully invest the Des Moines Company "with the TITLE, control and management of said properties provided for in said contract of January 2nd, 1882."* (Rec., 433.)

(c) That to enable the Des Moines Company to pay for the property and to maintain, operate and improve the same, and purchase other property necessary to carry out its objects, the president and secretary of the company were authorized and directed to issue fully

paid capital stock not to exceed \$1,000,000, and bonds not to exceed \$500,000, and to secure said bonds were authorized and directed to execute in the name of the Des Moines Company a first mortgage or deed of trust covering all the property of the Des Moines Company, and that when the committee had agreed with the parties to the January 2, 1882 contract as to the amount of bonds and stock of the Des Moines Company necessary to be delivered to them, the president and secretary of the Des Moines Company should deliver said stock and bonds to the several parties on receipt of the conveyances and assignments of the property to be made to the Des Moines Company. (Rec., 434.)

Frederick M. Hubbell as a member of the board of the Des Moines Company voted in favor of these resolutions, and as secretary of that company acted as secretary of the meeting. (Rec., 435.)

*In considering the significance of the foregoing resolutions it should be noted that the authority and direction given by them to the officers of the Des Moines Company to issue its bonds and stock is to be identified with the terms of the trust declared by the January 2, 1882, contract.*

Respecting the issue of bonds authorized by the resolutions, the trust contemplated that the expenses incurred by the purchases and improvements representing the trust property should be borne by the beneficiaries in the proportion of one-half by the St. Louis Company and one-quarter by each of the other two companies and that, through a Depot Company, such beneficiaries might reimburse themselves for this expense by the acceptance of mortgage bonds to be issued to them by such Depot Company to the amount of their respective portions of the cost of said purchases and improvements.

Respecting the issue of stock, the trust authorized the Depot Company to take charge of the property upon the terms of the January 2, 1882 contract and the resolutions in harmony with this idea appointed a committee to confer with the parties to such contract for the purpose of procuring from them such conveyances and transfers as would be necessary to fully invest the Depot Company "with the title, control and management of said properties provided for in said contract of January 2, 1882"; thus, the stock to be issued by such Depot Company became an indicia of ownership of the several proprietors in the trust title to be conveyed to the Depot Company as contemplated by the resolutions.

Supplementary resolutions of November 5 and 8, 1887,  
of the Des Moines Company and the proprietary com-  
panies, providing for the transfer of titles of the trust  
properties held by the individual trustees to the Des  
Moines Company.

It is to be noted that more than two years intervened between the passage of the resolutions of January 1, 1885, and the date of the above resolutions. This delay, in providing for the transfer of the trust property, arose by reason of the following circumstances:

On May 29, 1884, receivers were appointed of the railroads and property of the Wabash, St. Louis and Pacific Railway Company. (Rec., 229.)

On July 15, 1885, James F. Joy, O. D. Ashley, Thomas H. Hubbard and Edgar T. Wells, representing the holders of the defaulted bonds of the Wabash Company, associated themselves together as a purchasing committee for the purpose of acquiring at foreclosure sale the properties of the company. (Rec., 540, 1864.)

As already stated, the Wabash Company had advanced



to the Northwestern Company the funds necessary to enable it to build the extension of its line from Des Moines northwesterly, and it had received from the Northwestern Company as security for these advances a mortgage upon all the property of the Northwestern Company. This mortgage secured an issue of bonds at the rate of \$7,000 a mile, which were in default and had been acquired by the purchasing committee. It further appears that, although under the contract of 1882 the Northwestern Company should have contributed a quarter of the expense of acquiring the terminals held in trust for the proprietary companies and was to receive a quarter share in the trust enterprise, the Northwestern Company had in fact advanced only the sum of \$3,000, and was insolvent. (Rec., 478.) This discrepancy, between its obligations under the contract of 1882 and the value of the one-quarter share with which it was to be vested in the trust enterprise, proved an obstacle in the consummation of the conveyance of the trust properties to the Des Moines Company as corporate trustee and the distribution of the trust interest in the several amounts provided for in the contract of 1882. There developed therefrom a negotiation between Polk and Hubbell, representing a half stock interest in the Northwestern Company, with the purchasing committee, above described, of the Wabash Company, which resulted in an agreement dated the 10th day of September, 1887, by the terms of which the purchasing committee of the Wabash Company, which latter Company had advanced the moneys which should have been advanced by the Northwestern Company and had succeeded temporarily to the equitable interest of the Northwestern Company, agreed to furnish to Polk and Hubbell the general mortgage bonds of the Wabash Company held by it, secured by mortgage upon the prop-

erties of the Northwestern Company, to enable Polk and Hubbell to bid in the properties of the Northwestern Company at foreclosure sale. (Rec., 1573.)

In consideration of the foregoing, the Northwestern Company was to be reorganized by Polk and Hubbell and the reorganized company was to execute and deliver to the purchasing committee its bond for \$450,000, endorsed by Polk and Hubbell, in satisfaction of the Wash bonds to be delivered, as above described, to Polk and Hubbell and also for the one-quarter interest in the trust properties assigned to the Northwestern Company under the contract of January 2, 1882. (Rec., 1574.)

Simultaneously with the conveyance above mentioned of such one-quarter interest to the reorganized Northwestern Company, the same was to be mortgaged back to the purchasing committee as further security of the bond for \$450,000; and, if in the meantime the terminal property should be merged into a terminal company, the bonds and stock received from the terminal company in exchange for this one-quarter interest were to be transferred, in lieu of the property, to Messrs. Polk and Hubbell and retransferred by them to the purchasing committee, to be held by such committee as further security for the payments of the \$450,000 above mentioned. (Rec., 1575-1576.)

It thus appears that the above transaction was designed merely to re-establish the Northwestern Company to its original status under the terms of the trust.

When the above arrangement had been agreed upon, the proprietary companies were for the first time in a position to cause conveyance of their trust properties from the individual trustees to the Depot Company under the directions contained in the resolution of Jan-

uary 1, 1885. The resolutions of November 5 and 8, 1887, were addressed to the same objects as the resolution of January 1, 1885, namely, the transfer of the trust properties to the Des Moines Company as corporate trustee, but were more specific and comprehensive in their terms by further providing, in detail, for the distribution of the bonds and stock of the Des Moines Company.

At a board meeting of the Northern Company held November 5, 1887, a resolution was passed requesting How to transfer to the Des Moines Company certain property, which resolution was preceded by a recital that How had purchased such property with funds of the Wabash Company, but had taken the title in his name with the understanding that it should be transferred to the Des Moines Company "*under certain conditions.*" (Rec., 435.) At the same meeting, another resolution was passed requesting Dodge to transfer to the Des Moines Company certain property, which resolution was preceded by a recital that such property was acquired by him under an agreement with the Wabash Company that it should be transferred to the Des Moines Company "*under certain conditions.*" (Rec., 436.)

At a board meeting of the St. Louis Company held November 8, 1887, a resolution was passed requesting How to transfer to the Des Moines Company certain property, which resolution was preceded by a recital that he had purchased such property with funds furnished by the Wabash Company, taking the title in his name with the understanding that he should transfer such property to the Des Moines Company "*under certain conditions.*" (Rec., 437.) At the same meeting, another resolution was passed requesting Dodge to transfer to the Des Moines Company certain property, which resolution was preceded by a recital that such

property was acquired by him under an agreement with the Wabash Company that it should be transferred to the Des Moines Company "*under certain conditions.*" (Rec., 438.)

At the same board meeting of the St. Louis Company November 8, 1887, the following resolution was unanimously adopted:

"*Resolved*, that the president and secretary of this company be and they are hereby authorized and directed to execute to the Des Moines Union Railway Company, a deed conveying to it all its real estate, rights of way, franchise, roadbed and other property of said company lying and being in the City of Des Moines, east of Farnum street, whether the same was acquired by grant from City of Des Moines or by purchase or condemnation, this resolution being offered for the purpose of carrying out the contract of date January second, 1882, entered into by and between this company, the Des Moines North Western Railway Company, the St. Louis, Des Moines and Northern Railway Company and others." (Rec., 439.)

At a board meeting of the Northwestern Company held November 8, 1887, a resolution was passed requesting How to transfer to the Des Moines Company certain property, which resolution was preceded by a recital that he had purchased such property with funds furnished by the Wabash Company, taking the title in his name with the understanding that he should transfer such property to the Des Moines Company "*under certain conditions.*" (Rec., 442.) At the same meeting another resolution was passed requesting Dodge to transfer to the Des Moines Company certain property, which resolution was preceded by a recital that such property was acquired by him under an agreement with the Wabash Company that it should be transferred to the Des Moines Company "*under certain conditions.*" (Rec., 443.)

November 8, 1887, the St. Louis Company notified the Des Moines Company of the passage of the resolutions of its board of November 8, 1887, requesting How and Dodge to convey the property standing in their names to the Des Moines Company, which notice contained a copy of the resolutions as adopted. The St. Louis Company also on the same date, November 8, 1887, notified the Des Moines Company of the resolution adopted by its board November 8, 1887, directing its president and secretary to execute a deed of conveyance to the Des Moines Company, conveying all its rights of way, franchises, roadbed and other property in the City of Des Moines *for the purpose of carrying out the contract of January 2, 1882*, which notice contained an exact copy of the resolutions as adopted. (Rec., 439.)

November 8, 1887, the Northern Company notified the Des Moines Company of the resolutions adopted by its board November 5, 1887, requesting How and Dodge to convey to the Terminal Company the property purchased by them and standing in their names. This notice contains a copy of the resolutions as adopted. (Rec., 441.)

November 8, 1887, the Northwestern Company notified the Des Moines Company of the resolutions adopted by its board November 5, 1887, requesting How and Dodge to convey to the Des Moines Company the property purchased by them and standing in their names. This notice contains a copy of the resolutions as adopted. (Rec., 442.)

On the same day, to wit, November 8, 1887, a meeting of the directors of the Des Moines Company was held, there being present How, Runnells, Hubbell, Polk and Hays. (Rec., 1:299.)

At this meeting a preamble and resolution was adopted

which recited the previous action of the St. Louis Company, the Northern Company and the Northwestern Company, as above, and directed

“That on receipt from the Des Moines and Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company and the Des Moines & St. Louis Railway Company and from James F. How, trustee, and G. M. Dodge of deeds to this company of the property standing in their name in the City of Des Moines, that the officers of this company be authorized to issue to said James F. How and G. M. Dodge, respectively, an agreement to deliver to them as soon as prepared, bonds for the amount of money, with interest and taxes added, which will be shown by them at that time to have been expended by or through them for or on the property referred to.

The agreement for the delivery of bonds to be turned over to James F. How, trustee, to state that the same are for the benefit of the purchasing committee of the Wabash, St. Louis & Pacific Railway Company; also that the agreement issued by the officers of this company shall state that certificates can be prepared and the officers of this company will issue to the St. Louis, Des Moines & Northern Railway Company certificates for one-fourth of the stock of the company and to James F. How, trustee, to be delivered to the purchasing committee of the Wabash, St. Louis & Pacific Railway Company certificates for three-fourths of the stock of the company.” (Rec., 1300.)

It will be noted that the one-fourth stock interest deliverable under the above resolutions to the Northern Company was the interest originally assigned to it by the contract of January 2, 1882.

It will be further noted that the three-fourths stock interest assigned by the above resolutions to the purchasing committee of the Wabash Company represented its predecessors one-half interest under the contract of

January 2, 1882, and, in addition thereto, the one-fourth interest originally assigned to the Northwestern Company and which the purchasing committee had contracted to redeliver to the Northwestern Company as soon as Polk and Hubbell had carried out their undertaking to reorganize the Northwestern Company, as hereinbefore set forth.

Conveyances to the Des Moines Company, pursuant to the resolutions of January 1, 1885, and November 5 and 8, 1887.

The St. Louis Company, pursuant to resolutions of its stockholders of January 1, 1885, the resolutions of its board of directors of November 8, 1887, and the resolutions of the board of the Des Moines Company of January 1, 1885, on February 21, 1888, conveyed by warranty deed all its real estate, rights of way, railroad and franchises in Des Moines to the Des Moines Company. (Rec., 457.) Frederick M. Hubbell signed this deed of conveyance as secretary of the St. Louis Company, and testified that it was made pursuant to the resolution that such conveyance should be made to the Des Moines Company "for the purpose of carrying out the contract of January 2, 1882." (Rec., 1115.)

The Northern Company, pursuant to resolutions of its stockholders of January 1, 1885, and the resolutions of the board of the Des Moines Company of January 1, 1885, by quitclaim deed dated November 7, 1887, conveyed certain lots in the City of Des Moines to the Des Moines Company. (Rec., 455.)

The Northwestern Company made no conveyance to the Des Moines Company, as it had no property standing in its name, the property charged to the Northwestern Company having been paid for by the Wabash Com-

pany, and the title taken in the name of How. By the January 2, 1882, contract, the Northwestern Company, in common with the other railway companies, had an interest in the terminal property and the right to use the same in perpetuity.

James F. How as trustee made two deeds of conveyance to the Des Moines Company, one dated November 19, 1887, the other dated April 28, 1888, and one deed individually to the Des Moines Company, dated December 10, 1887. (Rec., 446, 448, 451.) These conveyances were made in pursuance of the resolutions adopted by stockholders of each the St. Louis Company, the Northern Company, and the Northwestern Company, January 1, 1885, the resolutions of the board of the Des Moines Company of January 1, 1885, and the resolutions of the board of directors of the Northern Company November 5, 1887, and of the St. Louis Company and Northwestern Company November 8, 1887. *Each of the deeds recited that the property was acquired and held by him in trust and was conveyed for the purpose and upon the terms set forth in the contract of January 2, 1882.*

Grenville M. Dodge made his deed of conveyance to the Des Moines Company November 7, 1887. (Rec., 453.) This conveyance was made pursuant to the resolution adopted by the stockholders of the Northern Company January 1, 1885, the resolutions of the board of the Des Moines Company of January 1, 1885, and of resolutions adopted by the board of directors of the Northern Company November 5, 1887, and of the St. Louis Company and Northwestern Company November 8, 1887.

All properties conveyed to the Des Moines Company subsequent to those above enumerated, and all the improvements made upon the terminal properties, were paid for either out of the revenue of the Des Moines



Company hereinafter referred to as "Surplus Earnings" or out of the proceeds derived from the sale of its bonds under its mortgage of November 1, 1887. F. M. Hubbell so testified. (Rec., 1095.)

*Des Moines Company's Mortgage.*

For the purpose of mortgaging the trust properties to reimburse the proprietary companies for the expense incurred by them in acquiring the terminal properties, as provided by Article Third of the contract of January 2, 1882, the Des Moines Company made its certain mortgage dated November 1, 1887. This mortgage recites, among other things, that for the purpose of paying for the property acquired by the foregoing conveyances, and to aid in the construction of the railway of the company, and to complete the necessary and desirable improvements thereon, the Des Moines Company proposed to issue its bonds in the amount of \$800,000, to be dated November 1, 1887, payable thirty years after date, to be secured by mortgage covering all of its property, including the property conveyed by the deeds of conveyance from the St. Louis Company, Northern Company, How and Dodge. (Rec., 460, 461.) The execution of this mortgage was ratified by the stockholders of the Northwestern Company and the St. Louis Company at meetings held, respectively, January 2 and 3, 1890. (Rec., 474, 475.)

*Meeting of Stockholders of the Des Moines Company of March 31, 1888.* (Rec., 476.)

On March 31, 1888, a meeting of the stockholders of the Des Moines Company was held, at which meeting a board of directors was elected. How, on behalf of the St. Louis Company, nominated four persons to be voted for as directors to represent the interests of that company; F. M. Hubbell, on behalf of the Northwestern Company, nominated himself and one other to be voted

for as directors to represent the interests of that company; G. M. Dodge, on behalf of the Northern Company, nominated himself and one other to be voted for as directors to represent the interests of that company. The eight persons so nominated were elected as the board of directors. (Rec., 476.) *At this meeting a resolution was adopted that the St. Louis Company, the Northwestern Company and the Northern Company, their successors or assigns, pay the operating expenses, taxes and interest on the bonds that may be issued under the aforesaid Des Moines Company's mortgage.* (Rec., 477.) A resolution was also adopted reciting that the Wabash Company had expended \$382,110.80, G. M. Dodge \$74,088.01, Polk and Hubbell \$2,000 and the Northwestern Company \$3,058.40, for the property acquired for the Des Moines Company, and it was thereupon resolved that a corresponding amount in the bonds of the company be delivered to these parties respectively, in settlement of such expenditures. (Rec., 478.) This settlement was made and bonds were issued accordingly, pursuant to paragraphs third and fifth of the January 2, 1882 contract, which provided that "said company (the Depot Company) may issue and deliver to the companies parties hereto its mortgage bonds to the amount of their respective portions of the cost of said purchases and improvements. (Rec., 412.)

It is to be noted, in the above connection, that, when the issue of shares of stock of the Des Moines Company was authorized by the resolutions of November 8, 1887, above quoted, the distribution of stock to the proprietary companies therein provided for bore no relation to the several sums of money recited above as being advanced by each in purchasing the trust properties, but that such distribution was to be on the basis of the terms of the contract of January 2,

1882, and as also provided for in the hereinafter mentioned agreement supplemental thereto of May 10, 1889, namely one-half to the St. Louis Company and one-quarter to each the Northern Company and the Northwestern Company. (Rec., 483, 711.)

At the meeting of the stockholders held November 1, 1887, of the Des Moines Company a resolution was adopted providing for an amendment to Article 3 of the Articles of Incorporation of the company so as to increase the authorized capital stock of the company from \$1,000,000 to \$2,000,000. (Rec., 1298.)

Supplemental agreement of May 10, 1889. (Rec., 479.)

This agreement made between the Des Moines Company of the first part and the St. Louis Company, the reorganized Northwestern Company and the Northern Company of the second part, was entered into for the purpose of regulating the user among the proprietary companies of the jointly owned premises, and providing for the distribution of operating expenses, taxes, interest on bonds and so forth.

Col. Wells H. Blodgett, the general solicitor of the Wabash Company, who was present at the stockholders' meeting of the Des Moines Company, held on March 31, 1888, which authorized this agreement and who prepared the same, gives the following testimony as to why this supplemental agreement was suggested:

"A. It was considered necessary to have something in addition to the agreement of January 2, 1882, for these reasons: In the first place the agreement of January 2, 1882, made no provision for the payment of interest and did not provide how the interest charge should be distributed among the railroad companies using the property. That was one reason. Another reason was, that the contract of January 2, 1882, did not obligate the railroad

companies who were parties to it or their assigns to use the terminal.

Q. Or pay interest?

A. Nor pay the interest. Let me see—there was the interest charge and the matter of using the property, and then the contract of January 2, 1882, put everything, all the expenses of maintenance and operation of all the property on a wheelage basis, and Mr. Hays and General Dodge and all the parties interested thought that the cost of operating the roundhouses should not be on a wheelage basis, but should be distributed among the railroad companies according to the number of engines that were housed and taken care of for each company; and those were the three things wherein, I think, the contract of May 10, 1889, differed from the contract of January 2, 1882.

Q. It was to cover those points?

A. It was for those reasons that all parties agreed it would be advisable to have a supplemental agreement." (Rec., 366.)

As above stated, the agreement had its inception in resolutions passed by the stockholders of the Des Moines Company at a meeting held March 31, 1888. There were present at this meeting Dodge, Polk, Hays, Hubbell, How, Blodgett and Martin. Among other things it was resolved that the Northwestern Company, the Northern Company and the St. Louis Company should pay operating expenses, taxes and interest on bonds *after deducting any amount received from other sources for rental*, prorated on a wheelage basis. (Rec., 477.)

Col. Blodgett was requested to prepare an agreement for thirty years from May 1, 1888, based on the above resolution and covering in detail the conduct and operation of the Des Moines Company, "*said agreement to be approved and executed by all lines now holding an interest in the property.*" (Rec., 478.)

Said agreement was to provide that if, at the end of six months from the date of the same, either party to

the contract should feel that the terms of the same were unjust to them, and gave notice to that effect, it was to be a matter of readjustment.

And it was further resolved

“that the terms and conditions on which the several lines now interested, or which may hereafter become interested, shall enjoy the use of these terminals, be fully set forth in a supplemental agreement to be made and executed between the Des Moines Union Railway Company and each of the lines using the said terminals.” (Rec., 478.)

Pursuant to the resolutions above recited, the supplemental agreement of May 10, 1889, was made and executed. (Rec., 479.)

After reciting, among other things,

that the first party was the owner of valuable terminal facilities;

that the second parties have railroads in the State of Iowa which terminate at or run into and through the City of Des Moines and in order to prevent expense and facilitate public convenience, it had become important that the second parties should have the use of such terminal facilities;

and that for the protection of the parties thereto and their assigns, “it is important that the rights, duties and liabilities of each in regard to the whole subject matter of said terminal facilities, including their use, care, control, rental, taxes, expenses, renewals, insurance and repairs, shall be stated and defined”;

It was agreed:

Section One: That the Des Moines Company was to provide, when its board of directors should deem expedient, a union passenger station and appurtenances for the use of the proprietary companies and shall acquire the additional real estate necessary therefor. (Rec., 480.)

Section Two: This relates to determining the amount of property required for the passenger depot. (Rec., 480.)

Section Three: The second parties agree to pay to the first party certain sums of money to be ascertained as follows. (Rec., 481.)

First: Five per cent interest upon the first party's mortgage bonds, *"less any deduction hereinafter provided for."*

Second: The cost of maintenance, repairs, taxes and insurance shall be ascertained monthly.

Third: The cost of operation, except the expenses specified in Section Nine (relating to engines), shall be ascertained monthly.

Section Four: This reads:

*"Having so ascertained the monthly aggregate of all the items and sums mentioned in the preceding section, there shall be deducted therefrom the amount, if any, which other railway companies may be under obligation to pay by virtue of contracts for the use of said property, or parts thereof, for the preceding month, and the remainder shall be paid by the parties of the second part in the proportion that the wheelage of each of said parties bears to the entire wheelage of all said second parties during such preceding month."* (Rec., 481.)

Section Five: The second parties are to pay on a wheelage basis any sums in default due from other railroad companies for the use of the property. (Rec., 481.)

Section Six: The Des Moines Company is to maintain the premises, provide engines, employees, the moving and handling of cars of the second parties, and to switch cars and handle all freight, and house and care for all engines of the second parties. (Rec., 482.)

Section Seven: The accounts are to be presented monthly. (Rec., 482.)

**Section Eight:** The contract is made retroactive from May 1, 1888, as relating to rental necessary to pay interest upon mortgage bonds. (Rec., 482.)

**Section Nine:** This provides for the distribution of expense for caring for and repairing engines and operating engine houses. (Rec., 482.)

**Section Ten:** This provides that upon default in payment by one of the parties, the first party may, "*with the consent of the remaining parties of the second part,*" assign the rights of such defaulting party to any other party for such sum as the board of directors of the first party may determine. (Rec., 483.)

**Section Eleven:** "*The directors of the party of the first part hereto shall appoint an executive committee, of which each party of the second part shall have one member as its representative.*" (Rec., 483.)

**Section Twelve:** The executive committee is to appoint the managing superintendent of the terminal properties, subject to the approval of the board of directors. (Rec., 483.)

**Section Thirteen:** The executive committee is to fix the superintendent's salary. (Rec., 483.)

**Section Fourteen:** This relates to use of terminal properties by passenger trains. (Rec., 483.)

**Section Fifteen:** The executive committee, subject to the board, shall make and enforce rules and regulations for the operations of the terminals. (Rec., 484.)

**Section Sixteen:** This relates to insurance. (Rec., 484.)

**Section Seventeen:** This provides for the keeping of books and accounts relating to such matters of agreement to be open to inspection. (Rec., 484.)

**Section Eighteen:** This provides for keeping records

of car movements and of all expenditures relating to cars and engines and the handling and switching of the same. (Rec., 484.)

Section Nineteen: This relates to distribution of cost of damages to rolling stock. (Rec., 484.)

Sections Twenty and Twenty-one: These are personal injury and property injury clauses. (Rec., 485.)

Section Twenty-two: This provides that the covenants, conditions and stipulations contained in the contract shall be binding for the term of thirty years from May 1, 1888. (Rec., 485.)

Section Twenty-three: The covenants and agreements of the second parties are several and not joint. (Rec., 485.)

Section Twenty-four: *This should be especially noted.* It provides that the St. Louis Company, as the owner of one-half of the capital stock of the Des Moines Company, "may sell and transfer one-half of said stock or one-quarter of the whole, to such railway company as may be acceptable to a majority of the parties of the second part, *in which case it is agreed that said railway company which may become the purchaser of said stock, may be admitted as one of the parties hereto of the second part upon the same terms and conditions as those stipulated for the other parties of the second part.*"

It is then provided that only as aforesaid may other railroad companies be admitted to the use of the first party's property without the consent of all the parties of the second part. (Rec., 485-486.)

Section Twenty-five: This authorized the assignment or mortgage by any of the second parties to another railroad company, of all its rights under the agreement, but prohibited a mortgage or assignment of a portion of its rights and privileges therein. (Rec., 486.)



Section Twenty-six: This *should also be especially noted*. It recites that the second parties are entitled to share in the stock of the first party in the following proportions, to wit: The St. Louis Company, one-half; the Northwestern Company, one-quarter; and the Northern Company, one-quarter. It recites further that no shares have been issued, and provides that as the authorized capital of the Des Moines Company is two millions of dollars, or twenty thousand shares, one certificate of ten thousand shares shall be issued to the St. Louis Company, one certificate of five thousand shares shall be issued to the Northern Company and one certificate of five thousand shares shall be issued to the Northwestern Company, "*and all of said certificates shall express upon their face that they are not transferable in whole or in part, without the consent in writing of all the parties of the second part to this agreement,*" except qualifying shares issued to a member of the board of directors, which shall be retransferable to the company on whose request such shares shall be issued without the consent of the other companies. (Rec., 486-487.)

Section Twenty-seven: This recites that the second parties having obligated themselves to pay as part compensation for the use of the premises, a sum sufficient to pay interest on bonds of the first party, issued or thereafter issued, and provides that the first party will not dispose of such bonds except for the purpose of purchasing with them, or their proceeds, additional terminal property. (Rec., 487.)

Section Twenty-eight: This is an arbitration clause. (Rec., 487.)

The following features of the supplemental agreement should be noted to show its significant relationship as a supplement to the contract of January 2, 1882, creating the

trust interests, and as further identifying the proprietary companies with the trust properties.

First (Section 4): The Des Moines Company was not intended to acquire revenue over and above its cost of operation, as amounts derived from other railroad companies were to be deducted from expenses apportionable among the proprietary companies.

Second (Sections 11, 12, 13, 15): The proprietary companies were to control the management and operation of the Des Moines Company through an executive committee of three, each of the three proprietors to have one representative. The executive committee was to appoint the superintendent of the properties and make and enforce the rules and regulations for the use, management and operation of the terminals.

Third (Section 26): (A provision wholly foreign to the ordinary operating agreement made between railroads occupying co-ordinate positions.) The respective interests of the proprietary companies in the trust properties, as provided for in the contract of January 2, 1882, are recited and it is then provided that the authorized capital stock of two million dollars, shall be distributed in the relative amounts so originally assigned, namely:

One-half to the St. Louis Company and one-quarter each to the Northwestern and the Northern Companies, *in single certificates, nontransferable except by unanimous consent of the second parties to the agreement.*

Fourth (Section 24): The one exception to the above rule was that the St. Louis Company might transfer one-half of its interest, or one-quarter of the whole stock of the Des Moines Company, to such railroad company as might be acceptable to a majority of the parties of the second part. Only as aforesaid were other railroad com-

panies to be admitted to the use of the terminals without unanimous consent of the parties of the second part.

*Fifth: That with the transfer of an aliquot portion of stock to another railroad company within the limitations of Section 24, went always a concomitant of user on a parity with the original proprietors. Thus the prerogatives of a tenant in common would be vested in each successive railroad stockholder acquiring its stock with unanimous consent (except in the one instant noted) of the other stockholders.*

Sixth (Section 5): If any outsider so admitted defaulted in its obligations, the second parties were to reimburse the first party on a wheelage basis for the amount of such default, thus showing the responsibility of proprietors to protect their own interests.

Seventh (Sections 3 and 27): The second parties were to pay the interest on the mortgage bonds and the Des Moines Company had no right to dispose of bonds, except for the purpose of purchasing with them, or their proceeds, additional terminal property or for improving or equipping that now owned by the Des Moines Company. (Rec., 479-488.)

There was no provision for the payment by the proprietary companies of any rental or compensation for the use of the terminal properties, or for the service that the Des Moines Company obligated itself to render to the proprietary companies.

Finally it should be noted that it is the stockholders of the Des Moines Company, in their resolution of March 31, 1888, who are resolving alone that the Northwestern, the Northern and the St. Louis Companies shall assume the expenses, taxes and interest on bonds of the Des Moines Company, as subsequently set out in the agreement of May 10, 1889, and who are providing that said

agreement shall "be approved and executed by all the lines now holding an interest in the property." (Rec., 476.) This resolution was unanimously adopted by the stockholders, including F. M. Hubbell. (Rec., 479.)

*From the foregoing it seems proper to assert, as an ultimate fact, that the supplemental agreement is, in a court of equity, nothing more than a written agreement between the equitable owners of the terminal property and their own trustee in possession settling the details of operation and accounting until May 1, 1918.*

On May 18, 1889, the directors of the Northwestern Company approved and authorized the execution of the same, and on May 25, 1889, a similar resolution was adopted by the directors of the St. Louis Company. (Rec., 1454, 1433.) The agreement was duly executed by the parties thereto on May 25, 1889. (Rec., 1597.)

*The amended articles of the Des Moines Company.*  
(Rec., 488.)

In 1886 John S. Runnells, who for many years had been the local attorney of the Wabash Company at Des Moines, resigned to take up work at Chicago. (Rec., 359.) He was succeeded by A. B. Cummins, who was the personal counsel of the defendant Hubbell, and of all the Hubbell interests. At the same time Mr. Cummins was appointed general counsel of the Des Moines Company. (Rec., 1204, 1211, 1233, 1236.) Although General Dodge was at this time nominally the president of the Des Moines Company, he resided at New York and the whole management of the Des Moines Company was left to the defendant F. M. Hubbell, who, in addition to being an officer and a director of the same, was regarded as a con-

fidential agent of the Wabash Company at Des Moines.  
(Rec., 132-136, 233.)

In January, 1890, Mr. Cummins, acting ostensibly on his own initiative and independently of the defendant Hubbell, set about to procure amendments to the articles of incorporation of the Des Moines Company.

At a meeting of the stockholders of the Des Moines Company held January 3, 1890, at the suggestion of Mr. Cummins

“James F. How moved that the question of amending the articles of incorporation of this company, as well as the question concerning the issue of stock for the purchase price of the property, be referred to Attorneys W. H. Blodgett and A. B. Cummins for their investigation and recommendation.” (Rec., 1307.)

No report was ever made by this committee, and it appears from the correspondence that no conference took place between Blodgett and Cummins, but that Cummins alone redrafted the proposed amendments to the articles of incorporation. In a letter by Cummins to Dodge, dated January 27, 1890, Cummins explains that the amendments were directed to two purposes.

First, to clear up the ambiguity and uncertainty with respect to the amount of stock to be issued on account of the original purchase of the property.

Second, to enable the Des Moines Company to act in all matters, without the previous authority of three corporations. (Rec., 1212.)

In respect to this latter subject matter, he explained in the letter to Dodge:

“I have endeavored to protect the interest of the minority as fully as it is protected in the present articles, that is to say, under the amendments as now proposed the company cannot do anything of im-

portance without the affirmative vote of the *one quarter* of the stock which your road will represent or the vote of one of the directors which you will always be able to control. By this arrangement, you will have *as effective a negative upon the* conduct of the company exerted directly by your stock, as you now have by requiring the previous formal action of the Des Moines & Northern Railway Company. I have given the matter the most careful attention, and while Mr. Hubbell was at first disposed to oppose the amendments which I have prepared, after a full explanation with him, I believe that he will support them. If this reaches you before he leaves New York, it will be well to talk the matter over with him. In any event give me your ideas as fully as you can, and particularly if you do not expect to be here." (Rec., 1212.)

At the time this letter was written, the defendant Hubbell was in New York, endeavoring to purchase an interest in the Des Moines Company. (Rec., 1013.)

On February 5, 1890, as will be set forth more in detail in the next subdivision of facts, Hubbell acquired from the purchasing committee of the Wabash Company one-half of its interest in the capital stock of the Des Moines Company, being one-quarter of the total interest in such stock. (Rec., 1599.)

On February 11th, the purchasing committee made a memorandum of agreement between it and Hubbell, wherein it was provided that the ownership of one-eighth of the stock in the Des Moines Company would permit one director to be nominated by any person or corporation holding one-eighth of the stock in such company. (Rec., 1601.)

The amendments to the articles of the Des Moines Company were passed at a so-called stockholders' meeting held at Des Moines, April 8, 1890. (Rec., 488.) No stock certificates of interest in the company had been issued

at this time. (Rec., 711.) The record of the meeting shows as present in person: How, Hays, F. M. Hubbell, Martin, F. C. Hubbell and Cummins, representing each one share, and present by proxy: Dodge and Blodgett, each representing one share. It is then recited that the Northwestern Company was present by Hubbell, its president, the Northern Company by Cummins, its vice president, and the St. Louis Company by How, its president.

It is, however, conceded that no one of these individuals held a proxy authorizing him to represent the interest of the company and that the directors of none of the three companies authorized any action to be taken amending the articles of the Des Moines Company. (Rec., 1165-1169.)

At this meeting the following amendments were adopted upon the vote of the eight individuals above named recorded as owning one share each of the Des Moines Company's stock (Rec., 489):

Article 1: This was not substantially changed. (For original articles see Record, 416.)

Article 2: The principal change in this article was the elimination of the provision that all powers exercised by the company should be in accordance with the terms and spirit of the January 2, 1882, contract, and the right of the company to lease or dispose of the use of any part of its franchise to any other railway company with the assent of the three Railway Companies.

Article 3: This was changed so as to provide, (a) for the increase formerly made by resolutions of March 31, 1888, of the authorized capital stock from \$1,000,000 to \$2,000,000; (b) the amount of stock to be paid for and actually issued; and (c) that all previous resolutions and issue of such capital stock be set aside.

Article 4: This was changed so as to provide that at all future elections of directors, *more than seven-eighths* of the votes of all the stock theretofore issued should be required to elect any director, *and that as to all matters except the ordinary operation of the property of the company the board of directors could act only upon the unanimous vote of the eight members of the board.*

Article 5: There was no substantial change made in this article excepting to provide for the annual election of the officers of the company, and that such officers might exercise such powers and be charged with such duties as usually pertain to their respective offices.

Articles 6, 7 and 8 were not changed.

Article 9: *This was changed so that the articles could be amended only by a vote of more than seven-eighths of all the stock instead of by three-fourths.*

Article 10: This was not changed.

There were added to the articles five new articles, to wit: Article 11, Article 12, Article 13, Article 14 and Article 15.

Article 11 related to the calling of special meetings of the stockholders.

Article 12 provided that each stockholder should have one vote for each share of stock owned, such vote to be cast either in person or by proxy.

Article 13 provided that it was not necessary in order to enable the company to carry on its business that all its authorized stock be issued.

*Article 14 approves, ratifies and confirms the purchase of the property theretofore conveyed to the Des Moines Company, and the conveyances made in pursuance thereof to that company, as well as the execution of the trust mortgage of that company.*



Article 15 purports to repeal, strike out and expunge the proceedings of the first meeting of the incorporators of the company held December 10, 1884, with certain preambles, which include the January 2, 1882, contract. (Rec., 416.)

Briefly stated, the effect of these amendments, if valid, was:

(a) To expunge from Article 2 of the original articles the provision that all powers exercised by the company should be in accordance with the terms and spirit of the January 2, 1882 contract, and that the right of that company to lease or otherwise dispose of the use of any part of its franchise to any other railway company could be exercised only on the assent of the three Railway Companies. With these exceptions, there remains no substantial difference between Article 2 of the original articles and Article 2 of the amended articles.

(b) To provide that 4,000 shares, aggregating \$400,000, of capital stock together with the first mortgage bonds theretofore issued for that purpose constitute the fair value of the terminal properties acquired by the Des Moines Company. That of such total number of shares 2,000 be issued to the purchasing committee, 1,000 to the Northwestern Company and 1,000 to the Northern Company, and that the remaining capital stock, to wit, 16,000 shares or any part thereof, shall be issued only by authority of a resolution of the stockholders adopted by vote of *more than seven-eighths* of all the stock theretofore issued.

(c) To provide that *more than seven-eighths* of the votes of all the stock issued should be required to elect any director of the company, and that the board of directors could act only upon the unanimous vote of the eight members thereof.

(d) To require the vote of more than seven-eighths of all the stock to amend the articles of the company.

(e) To approve, ratify and confirm all purchases of property theretofore conveyed to the Des Moines Company and the conveyances made in pursuance thereof to such company, as well as the execution of the mortgage of that company.

(f) To attempt to repeal, strike out and expunge from the company's records the proceedings of the first meeting of the incorporators of the company, held December 10, 1884.

Particular attention is called to the limitations in the foregoing amendments that *more than seven-eighths* of the votes of all the stock issued shall be required to elect any director and to amend the articles of the company, and that the board of directors could act only upon the unanimous vote of the eight members thereof. These limitations should be read in the light of the transactions and correspondence hereafter set forth in the third subdivision of facts which establish a definite agreement among the representatives of the three proprietary companies that a one-eighth stock interest in the Des Moines Company shall be sufficient to represent "a proprietorship" in the Des Moines Company.

*Annual Reports made by the Des Moines Company to the Executive Council of the State of Iowa for the purpose of the assessment of its properties for taxation by said Council. (Rec., 721.)*

On December 31, 1888, 1889, and 1890, and on January 1, 1892 and 1893, the Des Moines Company made an annual report to the executive council of the State of

Iowa for the purpose of taxation. In each of these reports appears the following :

“The Des Moines Union Railway Company is simply a ‘Representative Company’ acting as an agency at Des Moines for the Wabash Railroad Company, the Des Moines and Northwestern Ry. Company, and the Des Moines and Northern Railway Company, performing all the necessary work for them and charging each road at actual cost, its due proportion of the expense, thereby incurred. (Rec., 721.)”

These reports were under oath and the report for the year 1888 was verified by James F. How, vice president of the Des Moines Company and J. B. Van Dyne, general superintendent.

The report for 1889 was verified by Horace Seeley, general superintendent of the Des Moines Company.

The report for 1890 was verified by A. B. Cummins, vice president of the Des Moines Company, and Horace Seeley, general superintendent.

The report for 1891 was verified by F. C. Hubbell, president of the Des Moines Company, and Horace Seeley, general superintendent.

The report for 1892 was verified by A. B. Cummins, vice president of the Des Moines Company, and J. A. Wagner, superintendent. (Rec., 721-723.)

The fiduciary relations of F. M. Hubbell to the constituent companies in the trust and to the Des Moines Company.

F. M. Hubbell held in such companies positions as follows :

1. The St. Louis Company.

Director—1880-1891.

Secretary—1880-1891. (Rec., 1296.)

2. The Northwestern Company:  
 Director—1881-1886.  
 Treasurer—1881-1883, 1885-1886.  
 Asst. Treasurer—1884.
3. Reorganized Northwestern Company:  
 Director—1887-1892.  
 President—1887-1892.
4. The Northern Company:  
 Director—1881-1890.  
 Treasurer—1881-1883.  
 Secretary and Asst. Treasurer—1884.  
 Vice President—1885-1888.  
 Asst. Secretary and Treasurer—1889.  
 Secretary—1890.
5. The consolidated corporation formed by the merger  
 of the reorganized Northwestern and Northern Com-  
 panies:  
 Director—1891-1895.  
 President—1891-1895.
6. The Reorganized Consolidated Company:  
 Director—1895-1899.  
 President—1895-1899.
7. The Des Moines Company:  
 Director—1884, to the time of the institution of  
 the suit.  
 Secretary—1884, to the time of the institution  
 of the suit. (Rec., 1296.)

At the date of the reorganization of the Northwestern Company, the firm of Polk and Hubbell, through their ownership of the Narrow Gage Railway Construction Company, had acquired and held one-half of the stock of the Northwestern Company. (Rec., 400, 1104.) Under the reorganization of the Northwestern Company as

hereinbefore set forth, Polk and Hubbell acquired a majority of the capital stock of the reorganized company and held the same up to the time of the merger of that company with the reorganized Northern Company. (Rec., 621.)

The controlling interest in the Northern Company at all times was held by General Dodge, although the firm of Polk and Hubbell had acquired a minority interest in the stock through the Narrow Gage Railway Construction Company. (Rec., 1163.)

Upon the merger and consolidation of the reorganized Northern and Northwestern Companies, a majority of the capital stock was acquired by the firm of Polk and Hubbell and was held continuously by the Hubbell interests until the same was sold to the St. Paul Company in 1898.

It thus appears that, at the time of the important transactions involved in this litigation, the defendant F. M. Hubbell was an officer and director of the Des Moines Company and of its three proprietary companies and was the dominating stockholder of the Northwestern Company and of its successor the Consolidated Company.

F. M. Hubbell presented the resolutions adopted by the stockholders of the St. Louis Company and the Northwestern Company and voted for their adoption at the meeting held January 1, 1885, authorizing, among other things, the conveyance to the Des Moines Company of the real estate and franchises of said two Railway Companies in the City of Des Moines. (Rec., 424, 428.)

F. M. Hubbell, as a member of the board of directors of the Des Moines Company, voted in favor of the resolutions adopted by that company at a meeting held January 1, 1885, accepting the transfer, management and operation of the property theretofore held by the several

parties acquiring the same in the interests of the three Railway Companies and instructing its president to take such action as should be necessary to render such transfer, management and operation effective as provided in the January 2, 1882 contract. (Rec., 432.)

F. M. Hubbell signed the deed of the St. Louis Company, conveying its title to the properties to be held in the common interest, to the Des Moines Company, as secretary, and testified that such deed was made for the purpose of carrying out the January 2, 1882, contract. (Rec., 457.)

F. M. Hubbell executed the Des Moines Company mortgage, dated November 1, 1887, as secretary of that company. (Rec., 459.)

F. M. Hubbell was present at the stockholders' meeting of the Des Moines Company held March 31, 1888, and acted as secretary of that meeting, which adopted the resolution requesting that the supplemental agreement of May 10, 1889, be made and voted for the same. (Rec., 476.)

F. M. Hubbell signed the supplemental agreement as secretary of the Des Moines Company, as secretary of the St. Louis Company and as president of the Northwestern Company. (Rec., 479.)

Following the execution of the supplemental agreement of 1889, F. C. Hubbell, a son of F. M. Hubbell, and a member of the firm of Hubbell and Son, became the president of and a director in the Des Moines Company and held these offices continuously up to the time of the institution of the present suit. (Rec., 1183.)

## III.

THE INDEPENDENT TRANSACTIONS OF THE HUBBELLS IN RESPECT TO THE TRUST PROPERTY AND THE SEVERAL ALIQUOT INTERESTS EVIDENCED AND MEASURED BY SHARES OF STOCK OF THE CORPORATE TRUSTEE.

On June 12, 1888, Hubbell wrote to O. D. Ashley, president of the Wabash Company, saying:

"I have been asked several times whether a quarter interest in the Des Moines Union Railway stock could be bought, and, if so, at what price. I, of course, am unable to give any satisfactory answer. If you have a price at which you would be willing to part with a quarter interest in the Des Moines Union Railways Company stock and are willing that I should offer it, I would like to do so. If you do not wish me to offer it for sale, shall I refer the parties to you?" (Rec., 1059.)

On June 16, 1888, Mr. Ashley replied as follows (*italics ours*):

"Yours of June 12th received. My impression is that the purchasing committee will be glad to sell a one-quarter interest in the Des Moines Union Railway stocks if they could obtain a fair price for it, but I have always supposed *that it would be necessary to confine the sale to such railway companies as would be interested in the station.* It seemed to be desirable to offer the stock to the Chicago and Northwestern, if we could get that company to come into the station.

*Was there not an understanding or agreement as to the sale of the stock when the Terminal Company was formed and would it not be prejudicial to the interest of the whole to part with the stock to outsiders?*

I should like to hear from you on this point, after which I will bring the subject before the purchasing committee, as soon as possible." (Rec., 1059.)

On June 18, 1888, Hubbell replied to Ashley in part as follows (*italics ours*):

*"Yours of June 16th at hand. I agree with you that the sale of a quarter interest in the stock of the Terminal Company should be made only to a railway company, who will join with the Wabash in making a contract with the Des Moines Union, guaranteeing the interest upon the bonds and operating expenses, etc.*

*I think it would be prejudicial to sell any of this stock to outsiders, and I understand it, as you do, that the stock cannot be sold without the consent of the different railroad companies who now form the Terminal Company."* (Rec., 1060.)

Following the exchange of the above letters, the defendant Hubbell suggested that the purchasing committee surrender to the Des Moines Company a portion of the stock issuable to the St. Louis Company under the resolutions of 1887. This proposal was made in connection with the consideration of a preliminary draft of the supplemental agreement of May 10 1889, prepared pursuant to the resolutions of March 31, 1888. The proposal was rejected on September 17, 1888, in a letter from James F. How to Polk and Hubbell, reading in part as follows:

*"Mr. Ashley is in town and I have just had a talk with him concerning the amendments to the proposed contract for the use of the Des Moines Union Depot that you desire, viz.: that the purchasing committee should surrender one-fourth of their stock for the benefit of the Depot Company. Mr. Ashley says that this is an arrangement which he could not agree to on behalf of the purchasing committee being satisfied that they would not approve the surrender of any of their stock without a consideration."* (Rec., 1594.)

In the above connection, attention is called to Section twenty-four as embodied in the final draft of the agreement of May 10, 1889 (hereinbefore summarized), providing that the St. Louis Company, as the owner of one-half of the capital stock of the Des Moines



Company, may sell and transfer one-half of said stock or one-quarter of the whole to such railway company as may be suitable to a majority of the parties of the second part, in which case it is agreed that such railway company may be admitted as one of the parties to the agreement of May 10, 1889, upon the same terms and conditions as those stipulated for the other parties to such agreement; and the further proviso that, except as aforesaid, other railroad companies shall be admitted to the use of the terminal property, only upon the unanimous consent of the constituent companies.

Attention is also called in this respect to Section twenty-six which in providing for the issue of shares to the constituent companies, in the proportions allotted under the contract of January 2, 1882, requires that the certificates therefor shall express on their face that they are not transferable in whole or in part, without the consent in writing of all of the constituent companies.

In the early part of February, 1890, Hubbell went to New York to persuade Ashley to give him an option on one-half of the purchasing committee's interest in the Des Moines Company, that is a one-quarter interest in the Des Moines Company. As a result of this, on February 5, 1890, Ashley, as secretary of the purchasing committee, gave the following option in writing:

"I will give you for the purchasing committee the option of buying of them \$135,000 of the bonds of the Des Moines Union Railway Company and one-quarter interest in the capital stock of that company for \$135,000 and accrued interest from November 1, 1889, at any time within ten days from this date. Payment to be made in cash if the option is availed of by you." (Rec., 1599.)

Thereupon Hubbell explained the situation to Dodge, who asked to participate in the purchase, by taking one-

half of the optioned stock and bonds. Hubbell consented to this and thereupon closed his option by the following letter addressed to Ashley, dated February 5, 1890 (Rec., 1599) :

"I hereby accept the proposition made by you, for the purchasing committee to me, for the sale to me of \$135,000 of Des Moines Union Railway Company bonds, and a one-quarter interest in the capital stock of that company, and hand you now \$10,000 and will pay the balance as soon as you deliver the property."

On this letter is endorsed a receipt, dated February 5, 1890, reading :

"Received of F. M. Hubbell his check for ten thousand dollars on account of \$135,000 Des M. U. R. Co. bonds and one-quarter of the stock of said company as per letter written to him by me in behalf of the purchasing committee. O. D. Ashley."

On February 11, 1890, a bill of sale covering one-half of the bonds and one-half of the stock, included in the above option, was executed by Mr. Ashley and delivered to Mr. Hubbell. (Rec., 1601.)

This memorandum of agreement, made between the purchasing committee and Hubbell, recites that in the articles of incorporation of the Des Moines Company it is provided that the Wabash Company shall nominate four directors of the Des Moines Company; that the stock of the Des Moines Company is now held by different parties and in different proportions from what it was when said articles were adopted and that it was agreed therefore between the purchasing committee and Hubbell, who had acquired a one-eighth ownership of the stock of the Des Moines Company, that the purchasing committee would consent to such change in the articles of the Des Moines Company as would permit one director to be nominated by any person or corporation holding one-

eighth of the stock of the Des Moines Company. (Rec., 1601.)

The recital above made that Hubbell had acquired a one-eighth ownership was due to the fact that, by virtue of his understanding with Dodge, the one-quarter interest in the Des Moines Company, although optioned by him, was divided between him and Dodge; and at the same time and as part of the same transaction, a similar agreement covering the other eighth was executed by the purchasing committee and delivered to Dodge. (Rec., 1602.)

At the time of the above transaction, Hubbell began negotiating with the purchasing committee of the Wabash for the purchase of an additional one-eighth share of its interest in the Des Moines Company.

On April 1, 1890, he wrote Ashley as follows:

"In our last interview at your office it was understood that you would talk with Mr. Joy and Mr. Wells of the purchasing committee and write me upon what terms you would sell a one-eighth interest in the capital stock of the Des Moines Union Railway Company. Thinking that this matter might have escaped your memory I beg to say that I would like to hear from you in regard to it." (Rec., 1061.)

Ashley replied on April 5, 1890, as follows (our italics):

"I have yours of April 1st this morning. The result of my conversation with Messrs. Joy and Wells is a rather vague idea that we ought not to sell \$100,000 of the Des Moines Union Railway Terminal bonds and one-eighth interest in the capital stock at less than \$115,000 and accrued interest on the bonds, and I do not feel authorized to offer it at any less price. If, however, you will make me a definite bid of the best price you can, I will communicate it to the other members of the committee and will give you an early and definite reply. *It must be understood, of course, that a one-eighth interest in the capitel stock shall be sufficient to represent a pro-*

*prietorship in the company according to the under-standings we had when you were here."* (Rec., 1602.)

Hubbell accepted the terms proposed and consummated the purchase of the additional bonds and an additional one-eighth interest in the Des Moines Company, on June 5, 1890. (Rec., 1080.)

On June 5, 1890, a bill of sale was made by the purchasing committee to Hubbell, selling him fifty bonds of one thousand dollars each of the Des Moines Company and one-eighth of its capital stock for the sum of \$57,763. The bill of sale also provided that, upon payment of the above sum, the purchasing committee would deliver said five hundred shares to Hubbell by a certificate transferred by endorsement; and it further agreed to have the same transferred on the books of the Des Moines Company, so far as the vote of the directors of the Des Moines Company representing the St. Louis Company will secure said transfer. (Rec., 1613.)

Pursuant to the above, in due course, the certificate above provided for was issued to Hubbell.

At a stockholders' meeting of the Northwestern Company held on October 12, 1891, at which meeting it appeared that F. M. Hubbell and F. M. Hubbell and Son held sixty-five hundred shares and G. M. Dodge thirty-five hundred out of a total of ten thousand and four shares, it was resolved to consolidate the Northwestern Company with the Northern Company, pursuant to the terms of a certain agreement, set out in full in the resolution, made between Dodge and Humphreys as first parties and Hubbell as second party. In this agreement Dodge agreed to convey to the consolidated company, among other things, one-eighth of the capital stock of the Des Moines, being the stock acquired by him from the purchasing committee of the Wabash Company, and

Hubbell agreed to convey to the consolidated company one-quarter of the capital stock of the Des Moines Company, being the two-eighths of the stock acquired by him in February and in June, 1890, from the purchasing committee of the Wabash Company, and to receive as consideration for his two-eighths share \$60,000 in first mortgage bonds of the consolidated company. (Rec., 1461.)

At the time of the consolidation of the Northern and Northwestern Companies each of the companies held a one-fourth interest in the capital stock of the Des Moines Company, these shares being the shares originally assigned to each of said companies under the contract of January 2, 1882.

In addition to these shares Dodge and Hubbell undertook to transfer to the consolidated company their aggregate three-eighths interest mentioned above, so that it was contemplated that the consolidated company upon its formation would become the owner of seven-eighths of the stock of the Des Moines Company, the other eighth remaining in the hands of the purchasing committee of the Wabash Company.

The parties also agreed that contemporaneously with the consolidation of the Northern and Northwestern Companies, the consolidated company should execute and deliver to the Metropolitan Trust Company of New York a trust mortgage upon all of the properties so acquired by it, except stock of a certain coal company and five-eighths of the capital stock of the Des Moines Company. (Rec., 1462.)

Pursuant to the above arrangement, Dodge and Hubbell transferred their respective interests in the Des Moines Company to the consolidated company and the certificates were issued on January 15, 1892. (Rec., 711.)

Thereafter, pursuant to a resolution passed by the board of directors of the consolidated company on October 4, 1893, said five-eighths (\$250,000 par value) of the stock of the Des Moines Company was pledged with nineteen one thousand-dollar bonds of the Des Moines Company to F. M. Hubbell & Son, to secure an indebtedness owing Hubbell & Son by the consolidated company of \$122,000. (Rec., 1480-1481.)

On January 29, 1894, at a meeting of the board of directors of the consolidated company, at which were present: Hubbell, Martin, Cummins, Denman and Thompson, a resolution was passed reciting that the company was indebted to F. M. Hubbell & Son in the amount of \$128,833.33, which indebtedness was long past due; that the company had in its treasury certain of its first mortgage bonds, amounting to \$225,000, which it has been unable to dispose of at 55 per cent of their par value, although in its said efforts said bonds were offered to each of the stockholders of the company, as well as in the markets at said price; that the company was also the owner of 2,500 shares of the capital stock of the Des Moines Company, "*which shares of stock have no market value*"; that Hubbell and Son have offered to accept said \$225,000 first mortgage bonds at 55 cents on the dollar of their face value and have offered to purchase said capital stock of the Des Moines Company at 10 per cent of the par value thereof, and to cancel therefor the debt of the consolidated company to Hubbell and Son, and to assume and pay a certain indebtedness of the consolidated company, amounting to \$20,000, to the Metropolitan Trust Company; and which thereupon resolved that the treasurer of the company be authorized and directed to transfer to Hubbell and Son said bonds and said shares of stock, upon surrender of the notes of the consolidated company, evidencing the \$128,000 of

debt, and upon receiving an agreement from Hubbell and Son to pay the debt due the Metropolitan Trust Company. The records show that this resolution unanimously passed with F. M. Hubbell not voting. (Rec., 1482-1484.)

Although F. M. Hubbell abstained from voting at the meeting, it is undisputed that he was in complete control of the company. Of the seven members of the board of the company, three (F. M. Hubbell, F. C. Hubbell and H. D. Thompson) were members of Mr. Hubbell's family, and a fourth (A. B. Cummins) was the personal attorney for the Hubbell interests. (Rec., 1096.)

Following the pledge of the above shares to Hubbell and prior to the actual purchase of the shares, a meeting of the board of directors of the Des Moines Company was held, to wit: On October 4, 1893, at which the following minute was adopted:

"The Des Moines & Northwestern Railway Company, by its president, F. M. Hubbell, stated that they had found it necessary to transfer 2,500 shares of their stock in the Des Moines Union Railway Company to F. M. Hubbell and Son, by Certificate No. 26, dated October 4, 1893, and asked that the directors of this company consent to the transfer above mentioned."

Thereupon it was resolved that the consent to such transfer be given. (Rec., 1333.)

On the same date these shares were transferred in the name of F. M. Hubbell and Son on the books of the Des Moines Company and continued under that same registered number up to the institution of this suit. (Rec., 711.)

An examination of the records will disclose that no approval of the above transaction was given by Wabash Company or the St. Louis Company, as required pur-

uant to Sections twenty-four and twenty-six of the Supplemental Agreement of May 10, 1889.

Following the above transaction whereby Hubbell & Son obtained possession of five-eighths of the stock of the Des Moines Company a report was made to the executive counsel of the State of Iowa differing materially from the reports made for the years 1888, 1889, 1890, 1891 and 1892 hereinbefore set out. These earlier reports all stated that the Des Moines Company was merely a representative company acting as an agency at Des Moines for the three proprietary companies. The report for 1893 which was verified by A. B. Cummins, vice president of the Des Moines Company, and J. A. Wagoner, superintendent, the first named being the personal attorney of the Hubbell interests, contained the following statement:

"The Des Moines Union Railway Company is the owner of the property hereinbefore described and in addition to leasing the same to the Wabash Railroad Company the Des Moines, Northern and Western Railway Company and the Chicago Great Western Railway Company perform certain services for these companies and collect from them as rental for such services the aggregate amount of its expenses, which expenses are paid by the several railway companies in proportion to the use of the property and services rendered, as provided by contracts existing between this company and the said Wabash Railroad Company, the Des Moines, Northern and Western Railway Company and the Chicago Great Western Railway Company." (Rec., 724.)

Agreement of July 31, 1897. (Rec., 506.)

On July 31, 1897, a so-called agreement of ratification and confirmation was entered into between the Wabash Company, the Des Moines Company and the Consolidated Company, F. C. Hubbell signing as president for the last



two companies. This agreement recites the existence of the supplemental agreement of May 10, 1889, the parties thereto; that the Wabash Company now operates the St. Louis Company; that the Northwestern Company and Northern Company have ceased to own and operate their respective railroads, and that the consolidated company is now the owner of the same; that the Wabash Company and the consolidated company had been using the terminal properties for a long time past and that it is doubted whether said contract is legally binding upon the Wabash Company and the consolidated company. It is thereupon agreed that the contract shall become binding upon these two last named companies, as successors to their respective predecessors, and it concludes with the statement:

"that so much of said contract, a copy of which is hereto attached, as relates to the issuance and distribution of the capital stock of the said Des Moines Company, is no longer binding and that the capital stock of the said Des Moines Company is held as follows:

500 by the purchasing committee of the Wabash Company.

1,000 by the Des Moines & Northwestern Railway Company.

2,500 by F. M. Hubbell and Son.

A list is also given of shares issued qualified directors." (Rec., 506.)

The evidence introduced by the Hubbells in support of their plea of estoppel and laches.

The Hubbells have set up in their answer, among other things, the following:

"That the facts with reference to the ownership of the terminal property and stock in controversy have been known to the complainants and to their predecessors in interest ever since the dates of the

transactions complained of and were so known to the complainants and their predecessors in interest for many years prior to the commencement of this suit and that the complainants have been guilty of laches and their claims are stale and are barred and are not cognizable in equity." (Rec., 193.)

As supporting this plea of estoppel and laches, the Hubbells introduced certain evidence of negotiations occurring in the ten-year period between 1897 and the date of the institution of this suit, between the operating officials of the Wabash and St. Paul Companies and themselves, for an operating contract in substitution for, or in extension of, the supplemental contract of May 10, 1889, all of which negotiations failed.

In so far as these negotiations are concerned, as well as the "series of acts and circumstances" referred to in the majority opinion of the Circuit Court of Appeals we ask the Court to keep constantly in mind in connection with the defense of estoppel, namely, that the Hubbells themselves were the officers and directors of the Des Moines Company upon whom the proprietary companies and their respective operating and other officials were accustomed to rely for all information respecting the trust enterprise. Mr. How, who represented the Wabash Company during the development of the enterprise, retired as a director of the Des Moines Company in 1892 and died prior to 1897. (Rec., 1677.) The late Chas. M. Hays, who later was the active representative of the Wabash Company, resigned in 1895 and was succeeded by Joseph Ramsey, Jr. (Rec., 1659.) For all information respecting the terminals Ramsey was dependent on the Hubbells. (Rec., 1666.)

The St. Paul Company was a stranger to the terminal enterprise until 1898, when it purchased the property of the reorganized Consolidated Company and the officials

of the St. Paul Company were dependent upon the Hubbells for all information respecting not only the terminal enterprise but also the Consolidated Company.

A careful analysis of certain of the documents offered by the Hubbells in support of their plea of estoppel will develop a studied abuse of this relation of confidence.

It is sufficient in this connection to refer two letters which they themselves have offered in evidence.

On December 2, 1898, following the purchase of the consolidated company by the St. Paul Company, Mr. Roswell Miller, president of the last named company, wrote F. M. Hubbell as follows:

"I observe that the contract between the Des Moines Union Railway Company and the Des Moines Northern and Western Railroad Company is only for twenty years. I think it should be for fifty years. Have you any objection to extending it for so long?" (Rec., 1765.)

And on the same date Mr. Miller wrote asking Hubbell to send copies of any trackage contracts that were in existence. (Rec., 1766.)

On the following day F. M. Hubbell replied stating that there was no trackage contract except *the lease* (our italics) with the Des Moines Union Railway Company, a copy of which he had previously given to the St. Paul Company, which was of course the supplemental contract of May 10, 1889. It thus appears that at the very outset of his dealings with the St. Paul Company F. M. Hubbell deliberately suppressed the contract of January 2, 1892. (Rec., 1767.)

*The Hubbells' claim that the properties of the Des Moines Company were not held in trust for the use and occupation of the complainants thereby presenting the controversy as to the so-called Surplus Earnings.*

No question as to the equitable ownership of the terminal properties by the proprietary companies was ever made until October, 1905, when at a meeting in Chicago between the officers of the St. Paul and Wabash Companies and F. M. Hubbell the disposition of the so-called surplus earnings of the Des Moines Company, which had recently become a subject of controversy, was under consideration.

The history of the controversy as to the so-called surplus earnings is briefly as follows:

At the time of the execution of the supplemental agreement of May 10, 1889, it was contemplated that the only source of revenue of the Des Moines Company, independent of the contributions made by the proprietary companies, would be rentals paid by other railway companies admitted by contract to the use of the terminal properties.

Shortly afterwards, however, other sources of revenue developed. These were the switching of cars to and from industries adjacent to the terminal properties and rentals for unused office space in the Union passenger station.

The question then arose as to the proper disposition of these unexpected revenues.

Under the supplemental agreement of May 10, 1889, all expense incident to the ownership and operation of the terminal properties was charged against the proprietary companies on a wheelage basis and bills there-

for were rendered monthly. In determining the amount payable by each proprietary company there was, however, deducted from the bill its proportionate share on a wheelage basis of

"The amount, if any, which other railroad companies may be under obligation to pay by virtue of contracts for the use of said property, or parts thereof, for the preceding month." (Rec., 481.)

It is reasonably clear that switching charges and rentals from the station property are within the purview of the language above quoted, and the subsequent conduct of the parties confirms such construction.

The board of directors of the Des Moines Company at a meeting held February 11, 1891, adopted a resolution ordering:

"That the rents collected for the use of the company's real estate and the switching charges paid in be credited on the bills of the different tenant companies occupying this company's terminals, giving to each company its share ascertained by wheelage." (Rec., 497.)

This resolution was adopted by the unanimous vote of the eight directors of the Des Moines Company, including the defendant F. M. Hubbell, and particular attention is called to it as it is in line with the provisions of the supplemental agreement that the proprietary companies should have the full use and benefit of the terminal property including the proposed union depot building to be erected for their "use." (Rec., 480.)

Pursuant to the above resolution of the board of directors of the Des Moines Company all revenues from outside sources were credited to the proprietary companies on their monthly bills until January 7, 1892, when the board of directors adopted the following minute:

"Whereas this company is in need of a cash capital with which to purchase supplies and pay current bills

which come in before it receives its monthly revenue from the tenant companies, therefore be it resolved: That until the further action of the board the sums received as rents of real estate and all switching charges shall not be credited upon the accounts of the tenant companies but shall be used for the aforesaid purposes." (Rec., 499.)

On March 1, 1892, the auditor of the Wabash Company wrote to the superintendent of the Des Moines Company inquiring why no credit for switching revenues and rentals of real estate had been made on the bills for the preceding two months.

To this letter the superintendent of the Des Moines Company replied as follows:

"DES MOINES, IOWA, March 2, 1892.

*D. B. Howard, Auditor,  
Wabash Railway,  
St. Louis, Mo.*

DEAR SIR:

Replying to yours of the 1st inst. in regard to the allowance of switching, rentals, etc., that should be made on our bills for the months of December and January, I have to say that at a meeting of the executive committee held January 7, 1892, it was decided not to distribute these collections for a period of time until the Des Moines Union Railway Company could accumulate a small fund for working capital. I presume this will continue in effect until January, 1893. You will be furnished each month a statement showing the amount of this rental and your proportion of the same so you can make a charge against the D. M. U. Railway Company and carry it on your books as you see fit for future adjustment.

Yours very truly,

HORACE SEELEY,  
*Superintendent."*

This is written on the letterhead of the Des Moines Union Railway Company, general offices, G. M. Dodge,

president, F. M. Hubbell, secretary, H. Seeley, superintendent. (Rec., 338.)

Following the above action of the board of the Des Moines Company the outside revenues derived from switching and real estate rental were accumulated in a separate cash fund to be used as working capital. In the earlier period of the enterprise these earnings were relatively small and a number of years elapsed before a substantial fund had been accumulated. In the meanwhile the Hubbells had caused the consolidated company to transfer to the firm of F. M. Hubbell & Son 2,500 shares of the stock of the Des Moines Company, and when the St. Paul Company and the Wabash Company, having ascertained that the fund had accumulated in an amount greatly in excess of the requirements of the Des Moines Company for working capital, suggested that the excess be distributed among the proprietary companies in accordance with the practice and understanding of the parties, as evidenced by the resolution of February 11, 1891, the Hubbells failed to comply with the request. The subject became a matter of controversy which culminated in a meeting at Chicago in October, 1905, when the defendant F. M. Hubbell stated that he would not consent to the distribution of any part of the surplus earnings and that, moreover, upon the expiration of the supplemental agreement on May 1, 1918, the St. Paul Company and the Wabash Company could not have the right to use the terminals except upon such terms and conditions as he might make. (Rec., 329, 333.)

At the next meeting of the directors of the Des Moines Company representatives of the St. Paul Company and of the Wabash Company each filed a written protest against the refusal of the Des Moines Company to credit the surplus earnings in reduction of the monthly bills

rendered against the proprietary companies and made formal demand that without further delay all monies arising from rents of real estate, switching charges, etc. theretofore and thereafter collected, be credited on the bills rendered against the proprietary companies on a wheelage basis. (Rec., 334.)

Within a year thereafter the complainants commenced the present suit. (Rec., 3.)



## BRIEF OF ARGUMENT.

## I.

BY THE TERMS OF THE CONTRACT OF JANUARY 2, 1882, THE ST. LOUIS COMPANY, THE NORTHWESTERN COMPANY AND THE NORTHERN COMPANY, PREDECESSORS OF THE COMPLAINANTS, ESTABLISHED FOR THEIR JOINT AND SEVERAL BENEFIT AN EXPRESS TRUST IN CERTAIN RAILROAD PROPERTIES THERETOFORE ACQUIRED IN THEIR COMMON INTEREST.

(1) The terms of the trust so created by this instrument were as follows:

It is recited:

(a) That "the companies above named are engaged in the construction of railways converging at the City of Des Moines and have heretofore agreed upon the purchase, construction and maintenance at their joint expense for (of) terminal facilities in the City of Des Moines *to be held and used in common as hereinafter provided.*" (Rec., 412.)

(b) That in pursuance of said agreement various purchases have been made of real property in the City of Des Moines by a number of parties, individual and corporate. (Rec., 412.)

It is then agreed:

(a) That the expense of such purchases shall be borne in the proportion of one-half by the St. Louis Company and one-quarter by each of the other two companies and "*that a Depot Company may be organized and may take permanent charge of the property upon the terms herein set forth and that said company may issue and deliver to the companies, parties hereto, its mortgage bonds to the amount of their respective portions of the cost of the said purchases and improvements.*" (Rec., 412.)

(b) That "the title to said property is to be and

*remain in a trustee to be named by agreement of said companies but subject to the joint use and occupation of all of said railway companies upon the terms herein described."* (Rec., 412.)

(c) That the individual signers to the agreement "hereby declare said purchases to have been made in their names upon the trusts above referred to, and agree to quitclaim and convey the same to said trustee upon demand and reimbursement." (Rec., 412.)

(2) Under the terms of the trust the status of the proprietary companies was as follows:

(a) With respect to the premises subject to the trust the equitable interest of each was that of proprietorship, equivalent to an estate in fee in real property.

*Brown v. Fletcher*, 235 U. S., 589.

Pomeroy's Equity Jurisprudence, Fourth Edition, Section 975.

(b) With respect to each other they held equitable estates in a tenancy in common.

Pomeroy's Equity Jurisprudence, Fourth Edition, Section 147.

## II.

THE DES MOINES COMPANY WAS ORGANIZED PURSUANT TO THE EXPRESS PROVISIONS OF ARTICLE THIRD OF THE TRUST INSTRUMENT TO MAKE EFFECTIVE THE DEVELOPMENT OF THE TRUST IN CORPORATE FORM AS THEREIN AUTHORIZED, AND THE TERMINAL PROPERTIES OWNED BY THE PROPRIETARY COMPANIES WERE CONVEYED TO AND ACCEPTED BY IT FOR THIS PURPOSE.

This is established by the following facts:

(a) At the meeting of the incorporators of the Des Moines Company it was resolved:

"That for the purposes of carrying out the objects and purposes of the agreement heretofore, to wit, on the 2nd day of January, 1882, made and en-

tered into between the Des Moines and St. Louis Railway Company and others (which is set out in full in the following Articles of Incorporation), that the following be adopted as the Articles of Incorporation of the Des Moines Union Railway Company, to wit: "

Thereafter follow the Articles of Incorporation of the Des Moines Company, including within them the contract of January 2, 1882. (Rec., 416.)

(b) The Articles of Incorporation provide that "all the pow exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882." (Rec., 420.)

(c) At meetings of stockholders held January 1, 1885, of each of the Railroad Companies, party to the contract of January 2, 1882, it was duly resolved that such company accept and ratify the Articles of Incorporation of the Des Moines Company "as in substantial accord and compliance with the terms and conditions of the contract of January 2, 1882," and "undertake to discharge all the obligations imposed upon it by said contract in order to make effective the purposes of said Des Moines Union Railway Company," and that, in pursuance thereof, upon the issuance to it of the *bonds and stock* of said company to which it may be entitled *under said contract*, its proper officers be authorized to "convey, assign and transfer" to said Des Moines Company the properties "held, enjoyed or claimed by either or all of the signatories of said contract of January 2, 1882, or any agent or trustee thereof, purchased, acquired or held in pursuance of said contract." (Rec., 423-428.)

At meetings of stockholders held November 5 and 8, 1887, of each of said companies, it was further resolved that, whereas, under said contract of January 2, 1882, it was *intended* that the properties standing in the name of trustees should be transferred to the Des Moines Company *under certain conditions*, said trustees be requested to transfer to the Des Moines Company said properties upon receiving from it, in mortgage bonds of the Des Moines Company, the amount of money advanced for the

payment of its aliquot share of the capital stock thereof, said bonds and stock to be transferred to the proprietary company in lieu for the money advanced by said company to make the purchases, etc. (Rec., 435-442.)

(d) The Des Moines Company, by resolution of its board of directors, adopted January 1, 1885, reciting that, whereas, the Railroad Companies, parties to the contract of January 2, 1882, have notified the Des Moines Company that they severally approve of the organization of the Des Moines Company and have directed their officers, agents and trustees to surrender and deliver to such company the "railroad properties and franchises mentioned in said contract, and have requested it to take possession of, and maintain and operate the same for the purposes and on the terms mentioned in said contract and that said railway companies and individual signatories have indicated their desire and purpose to transfer said property to this company, *in accordance with the terms of said contract,*" duly resolved that said Des Moines Company "accepts the transfer and management and operation of said properties \* \* \* and assumes control thereof from this date, so far as practicable, and it hereby instructs its president to make such order as may be necessary to render such control and management effective *as provided in said contract.*" (Rec., 432.)

It further resolved that its officers be appointed a committee to confer with the several parties to said contract and "agree with them severally upon the terms and price at which they will respectively assign, transfer and convey said railroad property and franchises to this company and procure from them, and each of them, such conveyance and transfers as may be necessary to fully invest this company with *the title, control and management of said properties provided for in said contract of January 2, 1882.*" (Rec., 433.)

(e) Each Railroad Company, party to the contract of January 2, 1882, served notice upon the Des Moines Company of its resolution, as above set forth, requesting the transfer to the Des Moines Company *under certain conditions* of the properties thereto-

fore acquired subject to the terms of the contract of January 2, 1882; and the individual holders of said property thereupon made deeds of conveyance to the Des Moines Company reciting that for "convenience the legal title to said property was conveyed to me in trust" and that "said property was acquired and held for the purpose and upon the terms set forth in a certain contract made and entered into on or about the 2nd day of January, 1882," and that by the resolutions above set forth "it was intended that said property \* \* \* should be transferred to the Des Moines Union Railway Company *under certain conditions*," and the Railroad holders of certain of said properties executed and delivered their several quit-claim deeds for a like purpose. (Rec., 432-442, 446, 455-457.)

### III.

THE PROPRIETARY COMPANIES HAD NO CORPORATE POWER TO ALIENATE THEIR EQUITABLE ESTATES IN THE TERMINAL PROPERTIES IN THE CITY OF DES MOINES, ACQUIRED TO BE HELD AND USED BY THEM IN COMMON.

(1) The transfer of terminals to the Des<sup>ts</sup> Moines Company except as trustee of the proprietary companies would dismember the railway lines of the latter and cut them off from their entrance to the City of Des Moines. It is settled law that such alienation of property and franchises is *ultra vires*.

*Central Transportation Company v. Pullman Company*, 139 U. S., 28.

*Northern Pacific Railway Company v. Ely*, 197 U. S., 1.

*Northern Pacific Railway Company v. Townsend*, 190 U. S., 267.

Section 2066 of Code of Iowa of 1897.

*State v. Central Iowa Railway Company*, 71 Iowa, 410.

*Connor v. Tennessee Central Railway Company*, 109 Fed. Rep., 931.

(2) The Des Moines Company is a railway company and not a terminal company, and its railway lines are not open to use by connecting carriers as a matter of right.

Title IX, Chapter 1, page 587, Code of Iowa, 1897.

Title X, Chapter 5, page 748, Code of Iowa, 1897.

*Morgan v. Des Moines Union Railway Company*, 113 Iowa, 561.

*Chicago, Milwaukee and St. Paul Railway Company v. Iowa*, 233 U. S., 334.

*Iowa v. Chicago, Milwaukee & St. Paul Railway Company*, 152 Iowa, 317, 321.

Section 3 of Interstate Commerce Act.

(3) The transactions should receive a construction which would sustain rather than invalidate them.

*Hobbs v. McLean*, 117 U. S., 567, 576.

#### IV.

THE ALLOTMENT OF SHARES OF CAPITAL STOCK OF THE DES MOINES COMPANY TO THE SEVERAL PROPRIETARY COMPANIES IN THE RELATIVE PROPORTIONS OF THEIR SEVERAL PROPRIETARY INTERESTS IN THE TRUST PROPERTIES AS FIXED BY THE CONTRACT OF JANUARY 2, 1882, WAS INTENDED TO EVIDENCE AND MEASURE THEIR SEVERAL UNDIVIDED ESTATES IN THE PROPERTY SO HELD BY SUCH CORPORATE TRUSTEE.

Under the contract of January 2, 1882, it was contemplated that a corporation might act as trustee to hold title to the terminal properties for the benefit of the proprietary companies. (Rec., 412.) The proprietary companies incorporated the Des Moines Company to act as such trustee. (Rec., 416.) Its capital stock was issued to them in the several proportions of their respective

tive estates in the trust properties and was intended to represent the same:

(1) The Articles of Incorporation provide:

The Board of Directors of the Des Moines Company was to be designated by the proprietary companies and not by the stockholders, and representation in this respect was to be based upon relative proprietary interests. (Rec., 421.)

The Board of Directors of the Des Moines Company had no power to take any corporate action, except upon consent of the three proprietary companies. (Rec., 421.)

(2) Under the agreement of May 10, 1889, it was provided that

Shares should be issued to the proprietary companies in proportions relative to their several proprietary interests, as fixed by the contract of January 2, 1882, and in the instance of each proprietary company the shares so allotted to it should be evidenced by a single certificate expressing upon its face that the same should not be transferable in whole or in part without the consent in writing of all the proprietary companies. (Section twenty-six, Rec., 486.)

The St. Louis Company as the owner of one-half of the capital stock of the Des Moines Company might sell and transfer one-half (no more and no less) or one-quarter of the whole to such railway company as may be acceptable to a majority of the proprietary companies, *in which case it was agreed that such railway company may become the purchaser of said stock and may be admitted as one of the proprietors.* Only as aforesaid should other railroad companies be admitted to the use of the property of the Des Moines Company without the consent of *all* the proprietors. (Section twenty-four, Rec., 485.)

Thus an ownership by a railroad company of an aliquot share of capital stock acquired pursuant to the terms of Sections twenty-four and twenty-six

carried with it a right of user equivalent to a tenancy in common.

(3) Under the Amended Articles of Incorporation of the Des Moines Company, it was provided that its shares should be allotted to the proprietary companies in the relative amounts of their respective proprietary interests as fixed by the contract of January 2, 1882. (Rec., 491.)

In contemplation of the segregation of proprietary interests into *eighths* instead of *quarters*, it was further provided therein that "at all future elections it shall require the votes of more than seven-eighths of all the stock theretofore issued to elect any director," and that in all matters except the ordinary operation of the property "the Board of Directors can act only upon the *unanimous vote of the eight members thereof*." (Rec., 491, 492.)

(4) The transactions between Hubbell and the purchasing committee of the Wabash Company, whereby Hubbell and Dodge acquired certain stock interests in the Des Moines Company subsequently transferred by them to a proprietary company were had with the express understanding that an ownership in a railroad company of an aliquot amount of the capital stock of the Des Moines Company would represent a proprietorship in such company. (Rec., 1603.)



## V.

"THE SERIES OF ACTS AND CIRCUMSTANCES" THROUGH WHICH, IN THE MAJORITY OPINION OF THE COURT OF APPEALS, THE PROPRIETARY COMPANIES ARE SUPPOSED TO HAVE "GRADUALLY LET SLIP FROM THEM THE EXCLUSIVE OWNERSHIP AND CONTROL WHICH THEY HAD AT THE BEGINNING SO MUCH VALUED AND SO CAREFULLY GUARDED" WERE ALL IN HARMONY AND CONSISTENT WITH THE CONTINUED EXISTENCE OF THEIR RESPECTIVE PROPRIETARY INTERESTS.

THESE ACTS AND CIRCUMSTANCES ARE TO BE INTERPRETED IN THE LIGHT OF THE FOLLOWING PRINCIPLE, NAMELY, THE EQUITABLE INTEREST THAT EACH OF THE RAILWAY COMPANIES, PARTY TO THE CONTRACT OF JANUARY 2, 1882, ACQUIRED IN THE TERMINAL PROPERTIES OF THE DES MOINES COMPANY WAS MORE THAN A RIGHT IN PERSONAM OR CHOSE IN ACTION—IT WAS A RIGHT IN REM, NAMELY, AN ESTATE IN PROPERTY VESTED IN THIS RESPECT TO THE SAME EXTENT AS THOUGH THE LEGAL TITLE THERETO HAD BEEN CONVEYED TO SUCH COMPANY.

*Brown v. Fletcher*, 235 U. S., 589.

Pomeroy's Equity Jurisprudence, Fourth Edition, Section 975.

(1) The Articles of Incorporation of the Des Moines Company, adopted December 10, 1884, are based upon the premise that the Des Moines Company was organized for the sole purpose of making effective the trust created by the contract of January 2, 1882.

The resolution of the incorporators of the Des Moines Company, adopting its articles, recites that such company is organized for the purpose of making effective the trust created by the contract of January 2, 1882, and said contract is embodied in said articles as part of the organic law of the Des Moines Company. (Rec., 416.)

(2) In respect of the terminal properties, it was provided by the contract of January 2, 1882, that "the title to said property shall be and remain in a trustee to be named by agreement of said Companies but subject to the joint use and occupation of all of said Railway Companies upon the terms herein described," and that "said trustee," upon receiving quitclaim and conveyance to it

*of the trust properties should issue bonds secured by a mortgage upon the same to "reimburse" the temporary trustees for advances made by them or their beneficiaries in acquiring such properties. (Rec., 412.)*

The conveyances made by the temporary trustees to the Des Moines Company, the making of its mortgage of November 1, 1887, and the delivery by it of its bonds secured thereby to the temporary trustees and their beneficiaries, as "reimbursement" for advances made in acquiring the trust properties, were transactions all had in compliance with the trust instrument of January 2, 1882.

(3) After the concentration of the trust properties in the Des Moines Company, no equitable tenant in common in such trust properties ever conveyed, released or otherwise relinquished to the Des Moines Company, its equitable estate therein.

(4) The resolution of the stockholders of the Des Moines Company of March 31, 1888, providing for the making of a supplemental agreement fixing the terms and conditions upon which the proprietary companies should enjoy the use of the terminal properties, and the agreement of May 10, 1889, made pursuant to such resolution between the Des Moines Company and the three proprietary companies are based upon and presuppose the continuing existence of the contract of January 2, 1882, and of the trusts created thereby. (Rec., 476, 479.)

Said supplemental agreement of May 10, 1889, provided in substance for (a) a regulation in detail among the proprietary companies of the use of their common tenancy, (b) a defining of terms for distributing among the proprietors the cost of maintenance, operation thereof and interest on bonds, and (c) a fixing of the manner in which the several equitable estates in the trust property should be represented and regulated through the issue of the shares of the corporate trustee. (Rec., 479.)

(5) The amendments to the articles of the Des Moines Company were illegally adopted, but, without respect to their legality, they did not purport to and could not alter or destroy the equitable estates in common of the proprietary companies in the terminal properties.

## VI.

TO GIVE THE ACTS AND CIRCUMSTANCES HEREINBEFORE ENUMERATED A CONSTRUCTION OR ASPECT IN DEROGATION OF THE EQUITABLE ESTATES IN COMMON OF THE PROPRIETARY COMPANIES PURSUANT TO THE CHARACTERIZATION THEREOF OF THE MAJORITY OPINION OF THE CIRCUIT COURT OF APPEALS WOULD BE TO PERMIT TRUSTEES OR FIDUCIARIES NOT ONLY TO REPTDIATE THE RIGHTS OF THEIR CESTUIS QUE TRUSTENT, BUT TO ACQUIRE FOR THEMSELVES THE BENEFICIAL INTERESTS IN THE TRUST ESTATES.

(1) The Circuit Court of Appeals in its majority opinion holds that a trust was created under the terms of the contract of January 2, 1882; that the beneficiaries thereunder, the proprietary companies, at all times intended the continuance of such trust, but that the same through acts of inadvertence of the beneficiaries "apparently harmless" was destroyed, and that the Des Moines Company became an independent corporation holding the trust properties free from the terms of the trust and under the control of the Hubbells.

A trustee is not permitted to assert in his own behalf any right or interest in trust properties resulting from the inadvertence of his beneficiaries.

Bigelow on Estoppel, 6th Ed., page 589.

(2) As an officer, director and agent of the Des Moines Company, Hubbell was bound by the terms of the trust.

(3) The consolidated company, a successor in interest to the properties acquired to be held and used in common, of which Hubbell was also an officer and director, and the controlling stockholder, was subject to the disabilities of a fiduciary; for cotenants occupy to each other the position of express trustees in respect of the property held in common.

*Rothwell v. Dewees*, 2 Black, 613, at 618.

*Bissell v. Foss*, 114 U. S., 252, at 259.

*Turner v. Sawyer*, 150 U. S., 578, at 586.

*Starkweather v. Jenner*, 216 U. S., 524, at 528.

Therefore, Hubbell, as a successor to the consolidated company in ownership of a portion of the stock in the Des Moines Company, by a transaction in which he was virtually both seller and buyer, was a fiduciary in respect of the trust properties, for he could have rights no greater than those of his controlled vendor.

## VII.

THE FIVE-EIGHTHS STOCK INTEREST IN THE DES MOINES COMPANY HAVING BEEN ACQUIRED BY THE HUBBELLS FROM THE CONSOLIDATED COMPANY OF WHICH THEY WERE DOMINATING STOCKHOLDERS AND DIRECTORS IN VIOLATION OF THEIR FIDUCIARY OBLIGATIONS TO THE PROPRIETARY COMPANIES, THE DECREE HEREIN, IN ADDITION TO THE PRIMARY RELIEF ASKED, QUIETING THE EQUITABLE TITLES OF THE COMPLAINANTS IN THE TRUST PROPERTIES SHOULD ALSO PROVIDE FOR A RESCISSION OF THE STOCK TRANSACTION AND FOR A REDEMPTION OF THE SHARES BY THE COMPLAINANTS ON EQUITABLE TERMS.

(1) The transaction was intrinsically a fraud.

(2) The stock having been acquired by the Hubbells for the purpose of destroying the trust, the transaction is voidable by the beneficiaries thereof.

*Rothwell v. Dewees*, 2 Black, 613, at 618.

## VIII.

NO FACTS APPEAR IN THE RECORD CONSTITUTING AN ESTOPPEL OR LACHES DEFEATING THE EQUITY OF THE COMPLAINANTS.

(1) It is essential to the application of the doctrine of estoppel that a party asserting it must have been misled to his prejudice.

*Brant v. Virginia Coal & Iron Company et al.*,  
93 U. S., 326.

Bigelow on Estoppel, 6th Ed., page 476.

Herman on Estoppel, page 797.

*Chicago, Milwaukee & St. Paul Railway Company v. Des Moines Union Railway Company and others*, 165 Iowa, 35.

(2) Laches can never be asserted, upon an equivocal state of facts.

*Speidel v. Henrici*, 120 U. S., 377.

## IX.

THE SURPLUS EARNINGS WERE PROPERLY AWARDED TO THE COMPLAINANTS BY THE UNANIMOUS DECISION OF THE CIRCUIT COURT OF APPEALS.

(1) The surplus earnings are apportionable to the proprietary companies under Section Four of the supplemental agreement of May 10, 1889, as construed by the parties themselves.

*Topliff v. Topliff*, 122 U. S., 121, 131.

(2) The surplus earnings were determined to belong to the proprietary companies by formal action of the directors of the Des Moines Company, including the Hubbells, and such adjustment is binding upon the Des Moines Company.

*Central Trust Company v. Wabash, St. Louis and Pacific Railway Company*, 34 Fed. Rep.,  
254.

## ARGUMENT.

## I.

BY THE TERMS OF THE CONTRACT OF JANUARY 2, 1882, THE ST. LOUIS COMPANY, THE NORTHWESTERN COMPANY AND THE NORTHERN COMPANY, PREDECESSORS OF THE COMPLAINANTS, ESTABLISHED FOR THEIR JOINT AND SEVERAL BENEFIT AN EXPRESS TRUST IN CERTAIN RAILROAD PROPERTIES THERETOFORE ACQUIRED IN THEIR COMMON INTEREST.

It is the claim of the complainants in this case that the Des Moines Company holds title to the terminal railway properties at Des Moines in trust for their joint use and occupation. This claim has its foundation in the contract of January 2, 1882, made between the "St. Louis Company," the "Northwestern Company" and the "Northern Company," James F. How, James F. How, trustee, and Grenville M. Dodge.

To appreciate fully what was then done and what was intended to be secured thereby, this contract should be read in the light of those events and transactions which are set forth in Subdivision I of the statement of facts, which were preliminary to the establishment of the trust, and were the inducements for the same. From these facts it appears that Hubbell and his partner Polk, were the promoters, and that the Wabash, St. Louis & Pacific Railway Company, predecessor of the Wabash Company, was the financial sponsor of the enterprise, having as its object the construction and ownership of terminals at Des Moines to the end that the railroads which eventually became the Northwestern and the Northern Companies, lying as the arms of a Y, to the northwest and north of Des Moines, should be connected with the railroad which eventually became the St. Louis

Company, the stem of the Y, lying to the south of Des Moines through the terminal properties to be owned in common interest at Des Moines.

At the inception of this enterprise none of these three companies extended into the City of Des Moines, and the Wabash Company undertook also to finance the construction work to extend the respective lines for this purpose. Polk and Hubbell were the local people at Des Moines promoting all these activities. They, with others, incorporated the St. Louis Company for the purpose of constructing the extension from Albia to Des Moines on the south. They also reincorporated the Northwestern Company for the purpose of completing the left arm of the Y from Des Moines northwest to Fonda, to connect with and become a part of the railroad theretofore promoted by Hubbell. They also incorporated the Northern Company for constructing the third line along the right arm of the Y from Des Moines to Boone.

All this was done pursuant to written agreements, among these an agreement made December 8, 1880, between Hubbell, Polk, Clarkson and Runnells of the one part, owning and controlling the capital stock of the Narrow Gauge Railway Construction Company, and the Wabash Company on the other part. The first parties were to give their time, personal attention to and act as directors and officers of the enterprise. They were personally to exert themselves to procure subsidies in aid of the line and donations of lands, rights of way and other benefits in aid of construction.

The construction work of the three lines, as well as the assembling of the necessary terminal railways and facilities at Des Moines proceeded actively in 1881, and the operations were conducted from the office of Polk and Hubbell. Hubbell negotiated the purchase of real estate

for the terminal properties at Des Moines, and the funds therefor were advanced by the Wabash Company and by Gen. Grenville M. Dodge. Four parties acquired this real estate to be used for the common purpose. The St. Louis Company and the Northern Company acquired certain property largely obtained through condemnation proceedings. James F. How and Grenville M. Dodge took title to the remainder of the properties, Dodge paying for certain of the properties that were credited to the Northern Company.

At the close of the year 1881, the road of the Northwestern Company was open for operation, and its trains were running into the Des Moines terminals, and the two other roads were well advanced.

Thus, at this point, the following situation had developed:

The legal title to certain of the properties was in the Northern Company, which it had acquired by condemnation proceedings; the legal title to the certain other property was in the St. Louis Company, which it had also acquired by condemnation proceedings; the remaining property was in the title of certain individuals, namely, Dodge and How, without specification of the terms of the trust, but the beneficiaries of the trust were the three railway companies, by or on whose behalf all of the above referred to properties had been acquired, and which had provided the money for the acquisition thereof. It therefore appeared that operation had already begun on the terminal properties before any definite plan for the permanent holding of the properties for railroad purposes had been determined upon by the beneficiaries of the trust.

The above situation prompted the making of the contract of January 2, 1882 (Rec., 411), which lies at the foundation of the rights of the parties to this suit.



The three railroad companies and the two individuals above named joined in making it, and the Wabash Company subjoined a consent to the execution of the contract by the St. Louis and Northwestern Companies. The first five paragraphs of the contract are the substance of this controversy. They are very simple and very clear in their terms. We quote them here in full:

*“First.*

The Companies above named are engaged in the construction of railways converging at the City of Des Moines and have heretofore agreed upon the purchase, construction and maintenance, at their joint expense for terminal facilities in the City of Des Moines *to be held and used in common* as hereinafter provided.

*Second.*

In pursuance of said agreement, various purchases have been made of real property in the City of Des Moines in the name of James F. How, individually, James F. How, Trustee, and Grenville M. Dodge, and certain additional property has been appropriated by the Des Moines and St. Louis Railway Company, and the construction of buildings and other improvements upon said premises has been begun.

*Third.*

It is mutually agreed by the parties above named, that the expense incurred by the purchases and improvements above mentioned and such others as may be hereafter made, shall be borne in the proportion of one-half by the Des Moines and St. Louis Railway Company and one-quarter by each of the other two Companies above named. It is understood that a Depot Company may be organized and may take permanent charge of the property upon the terms herein set forth and that said Company may issue and deliver to the Companies, parties hereto, its mortgage bonds to the amount of their respective portions of the cost of the said purchases and improvements.

*Fourth.*

The title to said property shall be and remain in a trustee to be named by agreement of said Companies but subject to the joint use and occupation of all of said Railway Companies upon the terms herein described.

*Fifth.*

The individual signers hereto hereby declare said purchases to have been made in their names upon the trusts above referred to, and agree to quit claim and convey the same to said trustee upon demand and reimbursement." (Rec., 412, 413.)

From the above certain things are obvious.

(a) The Railroad Companies, parties to the agreement, had theretofore agreed that the terminal facilities, being then acquired at Des Moines, should be held and used in common by them, and that this contract of January 2, 1882, should provide the basis for this common tenancy.

(b) The common properties were held in severalty by four parties: two corporate and two individual. It was apparent that tenure for railroad purposes could not continue in this form and that, therefore, these several trustees must convey to a common trustee.

(c) It was therefore agreed that title was *to be and remain in a trustee, but subject to the joint use and occupation of all of said Railroad Companies upon the terms defined in the agreement.*

(d) The individual signers declared that the purchases made in their names were taken in trust and they agreed to quitclaim and convey the same to this single trustee *upon demand and reimbursement.*

(e) It was agreed that the contemplated trustee might be a Depot Company, to be organized to take

permanent charge of the property upon the terms set forth in the contract, and that said company might issue and deliver its mortgage bonds to the three constituent companies to the amount of their respective portions of the cost of said purchases and improvements.

It is very clear from the foregoing that the parties intended to vest in the three Railroad Companies a common proprietorship in the terminal properties acquired in their common interest, and it is also very clear that the parties intended to finance the properties so to be owned by them by an issue of bonds secured upon their common title.

Note particularly in this respect, that the temporary holders in trust of the properties are to convey and quit claim to a *trustee* (not to a vendee), only upon demand and reimbursement.

Note further in this respect that the expenses incurred by purchases and improvements are to be borne in the proportion of one-half by the St. Louis Company and one-quarter by each of the other two companies, and that the Depot Company, to be organized for the purpose of taking charge of the property, is to issue and deliver its mortgage bonds to the above companies to the amount of their respective portions of cost of the said purchases and improvements.

It follows beyond question that the title of the Depot Company in the terminal properties was to be of the character that would permit it to mortgage them to secure such bond issue, and that in this respect it must necessarily have been intended to act as a trustee agent, mortgaging the beneficial interests or the equitable estates of the three proprietary companies in their common tenancy; for the individual title holders were to convey the properties, for which they were to be reim-

bursed through these bonds, only to a *trustee* and not to a vendee.

The scheme of reimbursement thus contemplated was identical with that in common use among railroad companies, namely, the mortgaging of properties bought with current funds for the purpose of reimbursing the railroad treasury to the end that the railroad investment might be transferred to a permanent capital obligation. If the three proprietary companies had taken legal title as tenants in common, instead of equitable titles in this respect, they would have reimbursed themselves with a bond issue in identically the same manner.

The majority opinion of the Court of Appeals, has properly described the effect of the above contract as follows:

"As to the Companies, the contract not only declared some existing property rights, but attempted to define for the future the rights of title and usage of the terminal property. The title contemplated was a trust. The legal title to be 'in a trustee to be named by agreement of said companies.' The *beneficial estate* (italics ours) to be in the three companies in proportion to the parts each contributed to the payment therefor." (Rec., 2096.)

This Court has stated in the case of *Brown v. Fletcher*, 235 U. S., 589, that the equitable interest of a *cestui que trust* is more than a chose in action or a right *in personam*. It says that

"the modern cases do not treat the relation between trustee and *cestui que trust* as contractual."

The interest of the *cestui* is *in rem*. It is an estate in property to the same extent as if the property was in his possession and it passes by deed. In such case an instrument of alienation is not an assignment of a chose in action. It is a deed, or if not called a deed, "an evidence of the assignee's right, title and estate in and to property."

As stated in Pomeroy's Equity Jurisprudence, Fourth Edition, Section 975:

"In fact, the entire dealing of equity with the subject of equitable estates, and the fundamental distinctions between equitable and legal conceptions and modes are based upon the notion that equitable estates are in the truest sense property, and not mere rights to obtain certain equitable remedies."

In analyzing the subsequent transactions of the parties, this principle is important in determining their significance and effect.

It is to be noted that the ownership and control of property rights of this character, is *that* which the majority opinion of the Court of Appeals states was never intended to be released by the proprietary companies, and yet that Court says that through their acts of inadvertence, they have "gradually let slip from them that exclusive ownership and control which they had at the beginning so much valued and so carefully guarded." It is also to be noted, that the title to such property has thus gradually faded away to the advantage and interest of their own creature, the trustee, created by them with the sole object of conserving in each of them its equitable estate in common therein.

When an estate in trust is once solemnly created, transactions thereafter had between the trustee and his beneficiary will be presumed to be in harmony with and in furtherance of the trust estate so set up, for as is said in *Brown v. Fletcher*, above referred to, "the relation between the trustee and the *cestui que* trust is not contractual."

They are indeed one

"and a proceeding by the beneficiary or his assignee for the enforcement of rights in and to the property, held—not in opposition to but—for the benefit of the beneficiary, could not be treated as a suit on a

contract, or as a suit for the recovery of the contents of a chose in action, or as a suit on a chose in action." (p. 599.)

It follows that if, after making the trust instrument of January 2, 1882, the record had shown merely the organization of a railroad corporation by the three proprietary companies, warranty deeds of conveyance by the temporary trustees of the terminal properties to such corporation, and the issuing of mortgage bonds by such corporation in amounts sufficient to reimburse the grantors for such warranties of conveyance, all these acts would be *presumed* to have been done in furtherance of the trusts established by the contract of January 2, 1882.

It will appear, however, that in the corporate and intercorporate procedure had subsequent to the making of this contract, the parties to the same, with painstaking repetition of expression, contained in resolution, articles of incorporation and deed, took every step possible to continue the existence of the equitable tenancy in common set up among them in the terminal properties at Des Moines.

## II.

THE DES MOINES COMPANY WAS ORGANIZED PURSUANT TO THE EXPRESS PROVISIONS OF ARTICLE THIRD OF THE TRUST INSTRUMENT, TO MAKE EFFECTIVE THE DEVELOPMENT OF THE TRUST IN CORPORATE FORM, AS THEREIN AUTHORIZED, AND THE TERMINAL PROPERTIES OWNED BY THE PROPRIETARY COMPANIES WERE CONVEYED TO AND ACCEPTED BY IT FOR THIS PURPOSE.

At the first meeting of incorporators of the Des Moines Company, held at Des Moines, December 10, 1884, the proceedings state that the meeting was held for the purpose of organizing a Union Depot and Railroad Company,

to be run and operated in and around the City of Des Moines, Iowa, in pursuance of the contract of January 2, 1882. (Rec., 416.)

There were present at this meeting, Grenville M. Dodge, who appeared for himself and in the interest of the Northern Company; Polk and Hubbell, who appeared for the Northwestern Company; Runnells and Meek, who appeared for the St. Louis Company, and How, appearing as trustee and in his individual capacity. It was resolved:

"That for the purpose of carrying out the objects and purposes of the agreement heretofore, to wit, on the 2nd day of January, 1882, made and entered into between the Des Moines and St. Louis Railroad Company and others, (which is set out in full in the following articles of corporation) that the following be adopted as the Articles of Incorporation of the Des Moines Union Railway Company."

The articles begin with a recital that the St. Louis Company, the Northwestern Company and the Northern Company and Dodge and How have purchased properties upon certain agreed conditions at their joint expense in accordance with the contract of January 2, 1882.

Thereafter said contract is set out in full in said articles.

It is then recited that it was provided in said contract that a Depot Company might be organized to take permanent charge of the property, and that it was understood that the Company might acquire, operate and maintain said property in such manner as best to serve the interest of the parties.

In Article 2, it is stated that the object of the Company shall be to construct, own and operate a railway in and about the City of Des Moines, and that "*all the powers exercised by this company shall be in accord-*

*ance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882.*" (Rec., 420.)

It is to be noted that the articles provide that the affairs of the company shall be managed by a board of eight directors, four of whom shall be nominated by the Wabash Company and two by the Northwestern Company and two by the Northern Company; that no contract, lease or agreement, amounting to a permanent charge upon the properties of the Depot Company, shall be entered into by the board without having the approval of the three proprietary companies. (Rec., 421.)

Thereafter, on January 1, 1885, the three proprietary companies passed identical resolutions, accepting and ratifying the articles as in substantial accord and compliance with the terms and conditions of the January 2, 1882 contract, and requesting the temporary individual trustees to convey the properties held by them under the terms of the January 2, 1882 contract, to the Des Moines Company. (Rec., 423, 424, 429.)

On the same day the Des Moines Company adopted a resolution reciting that it had been notified by the proprietary companies that each had approved its organization and had directed its officers and trustees to deliver to the Des Moines Company the railroad properties and franchises mentioned in the contract of January 2, 1882, and had requested the Des Moines Company to take possession of and maintain and operate the same for the purposes and on the terms mentioned in the January 2, 1882 contract. It was therefore resolved that the Des Moines Company accept the transfer and management and operation and assume control thereof, so far as practicable, and instruct its officers to make such order as may be necessary to render such



*control and management effective as provided in said contract, and its officers were appointed as a committee to confer with the parties to the January 2, 1882, contract, to agree upon the terms and price at which they could respectively convey such property and franchise to the Des Moines Company and to procure from them and each of them such conveyances and transfers as might be necessary to fully invest the Des Moines Company with the title, control and management of such properties provided for in the January 2, 1882 contract. (Rec., 432, 433.)*

Hubbell, as a member of the board of the Des Moines Company, voted in favor of these resolutions, and as secretary of that company acted as secretary of the meeting. (Rec., 435.)

Owing to the receivership of the Wabash, St. Louis and Pacific Railway Company and the consequent insolvency of the Northwestern Company, for whose benefit the Wabash Company had advanced funds, and the consequent inability of the parties to the terminal enterprise to arrange for the assignment to the Northwestern Company of its one-quarter estate in the trust properties, no further action was taken to vest in the Des Moines Company title to the properties that it was to hold in trust, until November 5 and 8, 1887, when each of the proprietary companies passed resolutions reciting that the temporary trustees had taken title to certain properties, which were to be transferred to the Des Moines Company *under certain conditions*, and requesting that these temporary trustees convey the properties held by them to the Des Moines Company, for the purpose of carrying out the contract of January 2, 1882. (Rec., 435, 437, 442.)

In the instance of the St. Louis Company and the

Northwestern Company, with respect to the properties to which each took title for the common enterprise, they directed their own officers to make conveyance of the same to the Des Moines Company *for the purpose of carrying out the contract dated January 2, 1882.* (Rec., 436, 438, 439, 442, 443.)

On November 8, 1887, the three companies served notice upon the Des Moines Company that they had passed these resolutions. (Rec., 439, 441, 442.) On the same day the board of directors of the Des Moines Company adopted a resolution directing its officers, upon receiving conveyance of the properties in question, to deliver bonds to How and Dodge for the amount of money which will be shown by them to have been expended for, or on the property referred to, and that certificates for one-quarter of the stock be issued to the St. Louis Company and three-quarters of the stock be issued to the purchasing committee of the Wabash Company. (Rec., 1300.)

Pursuant to the foregoing, the St. Louis Company conveyed the properties held by it for the enterprise to the Des Moines Company (Rec., 457), and *Frederick M. Hubbell, who signed this deed of conveyance as secretary, testified that it was made pursuant to the resolution that such conveyance should be made to the Des Moines Company for the purpose of carrying out the contract of January 2, 1882.* (Rec., 1115.) The Northern Company conveyed its interest by quitclaim deed. How and Dodge made two deeds of conveyance. The How deeds recited that the property was acquired and held by him in trust and was conveyed *for the purpose and upon the terms set forth in the contract of January 2, 1882.* (Rec., 446, 448, 451.)

For the purpose of mortgaging the trust properties, to reimburse the proprietary companies for the ex-

penses incurred by them in acquiring the terminal properties as provided by Article Third of the contract of January 2, 1882, the Des Moines Company made its certain mortgage dated November 1, 1887, to secure an issue of bonds amounting to \$800,000. (Rec., 474, 475.)

The conveyances above recited, the execution of the mortgage of the Des Moines Company and the issuance of its bonds thereunder were all "approved, ratified and confirmed" in their original significance by virtue of Article 14 of the amended articles of the Des Moines Company, adopted at a meeting of its stockholders on April 8, 1890. (Rec., 494.)

The foregoing facts speak for themselves.

They show that with painstaking effort in corporate action, all the parties in interest strove to make an effective conveyance of the legal titles acquired in their common interest to the Des Moines Company to the end that their equitable and common estates therein should continue, to be availed of thereafter, for the purposes of their joint use and occupation of the terminal properties.

*The status thus reached in the affairs of the proprietary companies was never thereafter altered by any act which resulted in the defeasance or alienation of the estates thus created.*

In this respect, the following is to be noted:

(1) That a right of possession adverse to the user incident to the equitable estates of the proprietary companies never arose in favor of the Des Moines Company, even if it could be assumed that the Des Moines Company, in its capacity as trustee, could acquire a right by adverse user; for from the inception of the enterprise and during the period in which the four temporary trustees held title to the terminal property; during also the period after the conveyance of the same to the Des Moines Com-

pany, the permanent trustee, namely, from 1888, up to the making of the supplemental agreement of May 10, 1889; and since the making of said last named agreement to the present time, the three proprietary companies have been in constant use and possession of the premises operated by the Des Moines Company, thus asserting through several distinct periods and varieties of legal tenure, a continuing proprietorship therein.

(2) No instrument of any kind or character was ever executed by any proprietary company, or by any of its successors, releasing or conveying to the Des Moines Company its estate in the common property.

(3) Estates in property do not pass by acts of inadvertence to parties who are not innocent purchasers for value, and particularly in this respect to those holding a fiduciary relationship to the alleged grantors.

(4) The privity of relationship in respect of the controversy here involved is between the proprietary companies and their trustee. Therefore the transactions by which Hubbell acquired his stock in the first instance from the purchasing committee of the Wabash Company, even if admitted to be anomalous (an admission denied) could not alienate or release the trust estates set up by the proprietary companies, or relieve the Des Moines Company from its duties as a trustee or create an estoppel in its favor in this respect. They could not create an estoppel in favor of Hubbell, for the nature of interest, which an individual holding stock in the Des Moines Company (assuming his title in the same) could have in the trust properties, is not on trial here.

## III.

THE PROPRIETARY COMPANIES HAD NO CORPORATE POWER TO ALIENATE THEIR EQUITABLE ESTATES IN THE TERMINAL PROPERTIES IN THE CITY OF DES MOINES ACQUIRED TO BE HELD AND USED BY THEM IN COMMON.

One of the necessary objects of the proprietary companies in acquiring properties at Des Moines, upon which to construct and operate terminals, was to serve the public. The Railway Companies could exercise their powers of condemnation, by which a portion of the properties were acquired, only upon this theory. Moreover, with this same idea in view, three townships of Boone County, Iowa, voted and paid over to the Northern Company \$61,337.72, for the purpose of aiding the Northern Company in constructing its railway from Boone to a connection with the line of the Wabash Company, and each township by ordinance provided that the tax for raising this money be due and payable when the railroad connection to be so required shall have been completed and cars running thereon. These conditions were accepted in writing. (Rec., 789-797.) Green County voted taxes amounting to \$27,732.49 and Calhoun County likewise voted \$19,587.28 to the Northwestern Company for a similar purpose. (Rec., 797-820.)

On March 22, 1881, the City of Des Moines passed an ordinance granting a right of way to the St. Louis Company over, across and along certain streets in said city, upon which eventually became located the main lines of railroad of the Des Moines Company. This grant was made upon the condition that the Railroad Company locate and build passenger stations in East and West Des Moines, and that cars should be running into the city by the first day of January, 1882. By express provision,

the ordinance was to operate as a contract between the City of Des Moines and the St. Louis Company, upon acceptance of the same by the latter. (Rec., 443-445.)

Thus the proprietary companies having accepted public funds for the purpose of uniting their properties through the ownership of a common terminal, having exercised the sovereign right of condemning private property for this purpose, and having received a charter from the state to enable them to operate as an entity the terminal properties so acquired by them, it was beyond their power to put themselves in a position with respect to this railroad company and to the properties to which it took title in trust for their use and occupation, whereby they would be unable to serve the public.

In view of this principle, not only every presumption will be indulged to interpret their acts as intending to keep intact the joint control acquired over the terminal properties by virtue of their ownership in the same, but it should also be held that if attempt were made by them to part with this control their acts for such purpose should be regarded as ineffectual.

The contentions of the defendants in this case run counter to the above principle.

It is asserted by them that the proprietary companies deliberately abandoned their trust estates by selling properties, acquired by them for the purpose of making connections between their respective railroads, to an independent railroad company and deliberately became minority stockholders in such company, thus making imminent a situation now claimed by the defendants to have arisen, namely, a status of being strangers to properties which they had appropriated and otherwise obtained by sovereign prerogative for a public trust.

That it was not within their power to abandon title to railroad properties so acquired is the settled law of the land.

This Court has repeatedly decided that a railway corporation cannot alienate or turn over to another railroad corporation its railroad in whole or in part without the express consent of the state, under whose franchise the railroad was constructed or acquired.

*Central Transportation Company v. Pullman Company*, 139 U. S., 28.

Mr. Justice Gray, who wrote the opinion in this case, reviewed the law on this subject and stated the above principle as the "clear result" of the decided cases.

This Court by subsequent decisions has reaffirmed and followed the opinion of Mr. Justice Gray, and in applying the principle asserted therein, it has repeatedly held that railway properties dedicated to public use cannot be lost by adverse possession.

*Northern Pacific Railway Company v. Ely*, 197 U. S., 1.

*Northern Pacific Railway Company v. Townsend*, 190 U. S., 267.

Section 1300 of the Iowa Code of 1873, which is the same as Section 2066 of the Iowa Code of 1897, is as follows:

"SALE OR LEASE OF RAILROAD PROPERTY—JOINT ARRANGEMENT. Any railway corporation may sell or lease its property and franchises to, or make joint running arrangements not in conflict with law, with any corporation owning or operating any connecting railway, and any corporation operating the railway of another shall be liable in the same manner and extent as though such railway belonged to it."

It will be seen from the provisions of this statute that if it be desired to sell or transfer railroad property, the entire railroad together with its franchises—and not a part—must be sold or transferred. The Iowa statute does not permit a railroad to be dismembered, or the franchises under which it was constructed to be disrupted. The railroad and franchises are a unit, and are required to be held and used as a unit, and when transferred must be transferred as a unit. *State v. Central Iowa Ry. Co.*, 71 Iowa, 410. That a part of a railway system cannot be separated from its franchises is clearly shown in the opinion of Mr. Justice Lurton in *Congress v. Tennessee Central Railway Co.*, 109 Fed. Rep., 931.

The fact that the proprietary companies held their terminal properties at Des Moines in a common proprietorship makes but a distinction without a difference in the application of the above principle; since one owning a tenancy in a common estate has rights of user in all the properties of such estate (subject to like rights in its other tenants) equivalent to an exclusive proprietorship therein, and thus unity of ownership in terminals makes permanent for each carrier the means of interchange of through traffic with its associates.

If, then, it was beyond the power of the proprietary companies to convey away, or, as the District Court put it, "chop off," the most essential parts of their railways terminating in the City of Des Moines they, of course, could not by acquiescence or by a "series of acts or circumstances," as the majority opinion of the Circuit Court of Appeals states, *indirectly or unintentionally, "gradually let slip from them the exclusive ownership and control which they had at the beginning so much valued and so carefully guarded."* (Rec., 2114.)

In the case of *State v. Central Iowa Railway Co.*, 71



Iowa, 410, the rule is announced that, where a line of railroad has been built by aid of taxes levied for that purpose, the line in aid of which the tax was voted must be operated as a whole, and a portion thereof cannot be leased or operated separately to the injury of any locality on that line. A railroad company which avails itself of such aid assumes relations to the public different from those resulting from a mere private contract.

The majority opinion seeks to avoid the application of the above principle by yielding to an adroit but insidious "concession" of the Hubbells that the Des Moines Company must furnish reasonable and necessary terminal facilities to the St. Paul and Wabash Companies upon payment therefor of such reasonable sum as may be agreed upon, or in default of such agreement "*as may be fixed by the proper public tribunal.*" This conclusion rests upon the erroneous assumption that the Des Moines Company is a union railway depot company or terminal company, and as such is under legal obligation to permit the use of its tracks and terminal facilities by any railway company entering the City of Des Moines upon reasonable terms, which if not agreed upon between the parties may be fixed by some proper public tribunal.

The Des Moines Company, however, was not organized under the Statutes of Iowa as a union railway depot company, or as a terminal company, with the obligations usually charged upon such companies to serve other railroads. The statutes of the state provide for only two kinds of railroad companies, namely:

(a) Corporations for the construction and operation of railways. (Title IX, Chap. 1, page 387 *et seq.*, Code of Iowa 1897.)

(b) Corporations for the construction and main-

tenance of union railway depot companies. (Title X, Chap. 5, page 748 *et seq.*, Code of Iowa 1897.)

In the case of *Morgan v. Des Moines Union Railway Company*, 113 Iowa, 561, the Supreme Court of Iowa held that the Des Moines Company was organized under the former of the above statutes, namely, the general railroad incorporation law of the state, and that it therefore had rights and duties measured by this statute and not by the union railway depot act. This decision, being the construction by the highest Court of the state of a state law as applied to the status of the Des Moines Company, is conclusive here.

There is no statute of the State of Iowa which requires one railway company to give the use of its railroad tracks or terminal facilities to another railway company. The sole statute bearing on the subject is Section 2116 of the Code of Iowa, 1897, page 751, which in substance requires connecting carriers to interchange and transport empty and loaded cars. The statute was so construed in *Chicago, Milwaukee and St. Paul Ry. Co. v. Iowa*, 233 U. S., 334, sustaining the construction given to it by the Supreme Court of Iowa in the same case, 152 Iowa, 317, 321. Such an obligation is, of course, wholly distinct from a duty to permit one railway company to use the tracks or terminals of another.

Section 3 of the Interstate Commerce Act, in providing for the interchange of traffic between connecting carriers, makes by express provision the same distinction in the clause reading:

“But this shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.”

From the foregoing it follows that, if the proprietary companies have lost the equitable estates once existing

in them in the Des Moines terminals, they have no power by common law or statute to compel the Des Moines Company to give to them upon any terms the use of these terminals.

With such consequence resulting from any termination of the ownership in the Des Moines terminals originally existing in the proprietary companies, not only should their unintentional and "apparently harmless" acts never be interpreted as effecting a separation of such ownership from their other railway properties, but it should also be held that, even with design, they could not bring about such a result.

*Hobbs v. McLean*, 117 U. S., 567, 576.

#### IV.

THE ALLOTMENT OF SHARES OF CAPITAL STOCK OF THE DES MOINES COMPANY TO THE SEVERAL PROPRIETARY COMPANIES IN THE RELATIVE PROPORTIONS OF THEIR SEVERAL PROPRIETARY INTERESTS IN THE TRUST PROPERTIES AS FIXED BY THE CONTRACT OF JANUARY 2, 1882, WAS INTENDED TO EVIDENCE AND MEASURE THEIR SEVERAL UNDIVIDED ESTATES IN THE PROPERTY SO HELD BY SUCH CORPORATE TRUSTEE.

It is asserted by the Hubbells that the issuing of capital stock of the Des Moines Company to the proprietary companies was intended to represent in part the purchase price paid by the Des Moines Company for the conveyance to it of the beneficial interest of the proprietary companies in the Des Moines terminals, and is therefore inconsistent with the continuance of these equitable estates in the proprietary companies.

An analysis of the circumstances under which this capital stock was issued, the basis of its distribution and the limitations in its attributes and transferability will show quite a contrary intent.

To protect rights or conserve interests, a court of equity will always ignore form for substance. It is admittedly a legal fiction that regards the stockholders of a corporation as not in fact the owners of its corporate property, and when an instance arises in which it appears that shares of stock are not intended to evidence a thing of value separate and distinct from an aliquot interest or estate in the properties themselves of a corporation, a court of equity to protect such interests in corporate properties otherwise created and intended to be preserved will not hesitate to ignore the conventional status of such shares.

Judge Hook of the Court of Appeals has stated the principle clearly in his dissenting opinion in this case. He says:

*"But the doctrine of a corporate entity separate and apart from the persons composing the corporation is after all a mere legal fiction established for convenience and to serve the ends of justice. (Our italics.) It does not go beyond that. In equity the shell artificially assumed is not impermeable. The court will look through it and regard the kernel, and whenever justice requires will hold the stockholders as the corporation. That is being constantly done in equity in determining public rights as affected by the corporate association of particular individuals and the rights of the individuals among themselves and with respect to their organization."* (Rec., 2123.)

That in this case the stock of the Des Moines Company was not intended to be issued as a substitute thing of value for the equitable estates of the proprietary companies in the terminal properties, but was intended to measure their respective aliquot shares in their equitable estate in common is evidenced by all the facts. Of this Judge Hook says:

"After the conclusion is reached that the terminal

company had by gradual action thrown off its trust character and had become independent, attention is directed to the transactions in its stock. The power asserted by the individual defendants to control the terminal company and thereby to exclude the plaintiffs from the use of the terminals rests upon their possession of five-eighths of the issued capital stock. *There is, however, abundant proof that the stock of that company was intended only to represent the interests of railroad companies actually using the terminal facilities and as a method of apportionment among them. The stock was not intended as a source of personal or individual profit apart from railroad use. Stock ownership and terminal use were inseparable.* I know of no public policy or rule of law against such a status of corporate stock or its enforcement as between the parties who established it. If it were formally expressed in the corporate charter the world would have to take notice. But as between the parties themselves, those participating and having actual knowledge, internal evidence may disclose it. It should always be in mind that in this case there are no innocent purchasers relying upon public records. The contract of 1882 specified the proportional interests of the three original railroad companies and foreshadowed the organization of the terminal company to take the place of an individual trustee. *In 1884 the terminal company was organized for the expressed purpose of carrying out the contract.* My brothers see in the articles of incorporation some evidence of a departure from the trust and the beneficial relations, but it seems to me that *the intention to maintain them was asserted and re-asserted as definitely and positively as words would permit.* (Our italics.) While, as customary, the charter made provision for a capital stock, the connection between the distribution and future ownership of such thereof as might be issued and the railroad use of the property was manifested not only in that instrument but afterwards in many ways by both the railroad companies and the terminal company." (Rec., 2120.)

The Des Moines Company was incorporated Decem-

ber 10, 1884 (Rec., 416), but no certificates of stock were issued until after the attempted amendments to its articles of incorporation made at the alleged stockholders' meeting of April 8, 1890. (Rec., 488.) It is a fact, however, that the legal issuing of stock took place under the agreement of May 10, 1889 (Rec., 479), which, as will hereafter appear, was intended to regulate in detail the user and distribute the cost of operation and other expenses of the terminal properties among the proprietary companies; and which also allotted the stock of the Des Moines Company to the proprietary companies in specific amounts and defined its attributes and the limitations on its transferability. It is well settled that the issuing of certificates is not essential to make stock outstanding.

*Hawley v. Upton*, 102 U. S., 316.

*Farmers Mutual Telephone Co. v. Howell*, 132 Iowa, 22.

Article 3 of the original articles of incorporation of the Des Moines Company provided that the capital stock of the corporation should be one million dollars to be divided into shares of \$100 each to be paid in at such time as the board of directors may determine, and the board was authorized to receive in payment therefor the properties and franchises held by the St. Louis Company, the Northwestern Company, the Northern Company, James F. How and Grenville M. Dodge. (Rec., 420.)

At a meeting of the stockholders of the Des Moines Company, held on November 1, 1887, Article 3 was amended by making the capital stock two million dollars and again providing that the board of directors be authorized to receive in payment therefor the properties and franchises in the City of Des Moines, held by the above mentioned parties. (Rec., 1297-8.) At this meeting the board also adopted a resolution, offered by F. M. Hubbell, authorizing the issue of \$800,000 of mortgage

bonds of the company, and it is to be noted that the execution of this mortgage was ratified by the stockholders of the Northwestern Company and of the St. Louis Company at meetings held respectively on January 2 and 3, 1890. (Rec., 474, 475.)

*As a matter of fact stock of the Des Moines Company was never issued, to the proprietary companies, either in form or amount, or under circumstances, which could identify its issue in any way as a substituted consideration for the supposed conveyance to the Des Moines Company of the equitable estates of the proprietary companies in the terminal properties.*

Stockholders' Meeting of the Des Moines Company Held  
March 31, 1888.

At a stockholders' meeting of the Des Moines Company, held March 31, 1888 (Rec., 476), it was recited that, for the cost of acquiring the terminal properties, the parties are entitled to the following amounts:

Wabash Company .....	\$382,110.80
Grenville M. Dodge.....	74,088.01
Polk and Hubbell.....	2,000.00
Northwestern Company.....	3,058.40

It was therefore resolved that *in settlement of said amounts:*

- 382 bonds be issued to the purchasing committee of the Wabash Company
- 74 bonds to Grenville M. Dodge
- 2 bonds to Polk and Hubbell
- 3 bonds to the Northwestern Company.

These bonds were to be those to be issued under the mortgage of the Des Moines Company, dated November 1, 1887, and authorized by the resolution of the stockholders of the same date above referred to, and in due course the bonds above authorized were delivered to the several parties entitled to receive the same in reimbursement of their advances. (Rec., 459.)

These proceedings were all had in exact accord with the contract of January 2, 1882, which it will be remembered provided that the terminal properties should be permanently financed by the issue of mortgage bonds which were to be used *to reimburse* the several parties to the trust instrument in the "amount of their respective portions of the cost of said purchases and improvements." The temporary trustees, namely, the two railroad companies and the two individuals, were to severally convey the trust properties acquired by them to the new "*trustee upon demand and reimbursement.*"

The capital stock of the Des Moines Company, under the resolutions adopted at the respective stockholders' meetings of the proprietary companies, held on November 5 and 8, 1887, was to be delivered with the bonds above provided for to the proprietary companies "in lieu for the money advanced" to purchase the terminal properties. From this it is quite evident that the parties intended such stock to represent their several equitable estates in the terminal properties, for, as above shown, the bonds of the Des Moines Company were made the means of completely reimbursing the temporary trustees for their advances, and the capital stock to be issued with them, pursuant to the above resolutions, could thus have office only as identifying the estates of the proprietors.

The agreement of May 10, 1889, making provision for the issue of this stock, gives it attributes to make effective the above intent. This agreement, the detail purposes of which are to be hereafter discussed in a further subdivision of this brief, had its inception in another resolution adopted at the stockholders' meeting of March 31, 1888, above referred to.

It was resolved that the three proprietary companies



should "pay the operating expenses, taxes and interest on bonds that are, or may be issued, after deducting an amount received from any other sources for rental, pro-rated on a wheelage basis," and it was further resolved that "Col. Blodgett be requested to prepare an agreement for thirty years from May 1, 1888, based upon the above resolution and covering in detail the conduct and operation of the Des Moines Union Railway Company, said agreement to be approved and executed by all the lines now holding an interest in the property." (Rec., 477-8.)

As the result of this resolution and further provisions of the same, to be hereafter commented upon, the agreement of May 10, 1889 (Rec., 479), was drafted and executed. Sections twenty-four and twenty-six of this agreement defined the characteristics of the shares of stock to be issued by the Des Moines Company, and by virtue of their provisions, such shares became in fact then legally outstanding. This is important to remember in considering the effect of the resolution relating to the issue of stock subsequently attempted to be adopted by the stockholders of the Des Moines Company at the illegal meeting held by them on April 8, 1890 (Rec., 494), at which an attempt was also made to amend the articles of incorporation.

Sections twenty-four and twenty-six of the agreement of May 10, 1889, carried out the understanding of the trust instrument, that the tenancy in common should be divided into aliquot estates, each of which should be at least one-quarter of the entire common estate. It will be remembered that, by the provisions of this trust instrument, the St. Louis Company was to have a one-half interest and the Northwestern and Northern Companies a one-quarter interest each in the trust properties. (Rec., 412.)

In Article 4 of the original articles of incorporation this understanding was recognized and given force by the proviso that four members of the board of directors were to be nominated by the Wabash Company (controlling the St. Louis Company), and two members by each the Northwestern Company and the Northern Company. (Rec., 421.)

Section twenty-six of the agreement of May 10, 1889, again protects the aliquot interests of the proprietary companies on the above basis in the common estate. It recites that the second parties "are entitled to the shares of stock of said first party in the following amounts, or proportions, to wit:

The St. Louis Company to one-half said shares.

The Northwestern Company to one-quarter said shares, and the Northern Company to one-quarter said shares."

It then provides, "that as the authorized capital stock of said company is two million dollars, or twenty thousand shares of \$100 each, the same shall be issued and held as follows, to wit:

One certificate of ten thousand shares shall be issued and delivered to the 'St. Louis Company.'

One certificate for five thousand shares shall be issued and delivered to the 'Northern Company,' and

One certificate of five thousand shares shall be issued and delivered to the 'Northwestern Company,' and *all of said certificates shall express upon their face that they are not transferable in whole or in part without the consent in writing of all the parties of the second part to this agreement.*" \* \* \* (Rec., 487.)

Here was obviously shown the intent to evidence the ownership of the several estates of the respective par-

ties by the capital stock of the Des Moines Company and not, as contended by counsel for the defendants, to artificially substitute rights *in personam* identified with shares in a corporation as the sole prerogatives of the stockholders from the rights *in rem*, which theretofore were vested in them, and which, the Court of Appeals has held, they never intended to abrogate or surrender.

The issuing of shares or certificates has no magic in and of itself to alter the status of the proprietors of a corporation in their relation to its properties. Intent, as determined by what the parties in fact did in such a transaction, will be the controlling factor in an analysis of their interests. The distribution then of stock in single blocks among the parties in the proportions of their several estates, with attributes of alienation limited to unanimous consent to the end that the common estate should continue in the proprietors as an entity, was but the means of evidencing, through the conventions of a corporation, the titles of the several parties in the trust properties. Judge Hook says of this:

“There is, however, abundant proof that the stock of that Company (Des Moines Company) was intended only to represent the interests of the Railroad Companies actually using the terminal properties, and as a method of apportionment among them. The stock was not intended as a source of personal or individual profit apart from railroad use. Stock ownership and terminal use were inseparable.” (Rec., 2120.)

The above idea is emphasized by the provisions of Section twenty-four of this agreement of May 10, 1889. It provides:

“That the ‘St. Louis Company’ as the owner of one-half of the capital stock of the ‘Des Moines Company’ may sell and transfer one-half of said stock, or one-quarter of the whole to such railway company as may be acceptable to a majority of the

parties of the second part; in which case it is agreed that said railway company which may become the purchaser of said stock, may be admitted as one of the parties hereto, of the second part, upon the same terms and conditions as those stipulated for the other parties of the second part. Only as aforesaid shall other railroad companies be admitted to the use of the property of the first party, without the consent of all of the parties of the second part, and the compensation to be paid by any other railroad company, or person not a party hereto (or provided for as aforesaid), for the use of said depot or terminal facilities, or any part thereof, shall be determined by the Board of Directors of said first party." (Rec., 487.)

Note that here the St. Louis Company may sell a one-quarter interest (no more and no less), that is one of the aliquot estates in the common tenancy with the consent of the majority of the parties, and that with the transfer, under such circumstances, of the stock representing such aliquot estate, is to pass as a concomitant, a right of user on a parity with the original proprietors who, as it will hereafter appear in an analysis of the agreement of May 10, 1889, paid no rent for the use of their own premises, and received in the reduction of the cost of operation of the terminal properties, revenue derived from outside companies who were not stockholders and were thus not proprietors in the enterprise. Thus, the prerogatives of a tenant in common would be vested in each successive railroad stockholder acquiring its stock as provided in Section twenty-four.

From the foregoing it appears that as the result of the action taken at the meeting of the stockholders of the Des Moines Company held March 31, 1888, and the delivery pursuant thereto of bonds of the Des Moines Company to reimburse those who had advanced the moneys to acquire the terminal properties, and of the execution of the agreement of May 10, 1889, between the

*Des Moines Company and the three proprietary companies, they and their corporate trustee had consummated the plan contained in the contract of January 2, 1882, to organize a corporate trustee whose bonds should be used to reimburse them for advances made on account of the terminal properties and whose stock was to be issued as evidencing their respective equitable estates in the common property to which such trustee was to take title.*

Stockholders' meeting of the Des Moines Company of April 8, 1890.

In the latter part of 1888, or in 1889—in any event, sometime after the passing of the resolution of March 31, 1888, A. B. Cummins became the personal counsel of the Hubbells and the Hubbells' interests, and also the General Counsel of the Des Moines Company. (Rec., 1204, 1211, 1233, 1236.) Although General Dodge was at the time nominally the president of the Des Moines Company, he resided at New York, and the whole management of the Des Moines Company was left to Hubbell, who, in addition to being an officer and an agent of the same, was regarded as the confidential agent of the Wabash Company at Des Moines. (Rec., 132-136, 233.)

In January, 1890, Mr. Cummins, acting ostensibly on his own initiative and independently of Hubbell, conceived the idea that certain amendments should be made to the articles of the Des Moines Company. He had had nothing to do with the drafting of the contract of January 2, 1882, or with the drafting or adoption in 1884 of the articles of the Des Moines Company, and he testified that, while he was familiar with the contract of May 10, 1889, he had had nothing to do with the negotiations and formulation of this agreement. (Rec., 1205.)

At a meeting of the stockholders of the Des Moines Company held January 3, 1890, at the instance of Cummins the question of amending its articles and of issuing stock for the purchase price of the properties was referred to Attorneys Blodgett and Cummins. (Rec., 1307.) No conference, however, took place between Blodgett and Cummins, and Cummins alone redrafted the proposed amendments to the articles. In a letter to Blodgett dated January 22, 1890, he urges the necessity of a redraft of the articles (Rec., 1210), and in a letter to Dodge dated January 22, 1890, he writes that

"you will observe that these amendments are directed to two purposes: First, to clear up the ambiguity and uncertainty with respect to the *amount* of stock to be issued on account of the original purchase of the property. Second, to enable the Des Moines Union Railway Company to act in all matters without the previous authority of three corporations." (Rec., 1212.)

In addition to preparing the drafts of amendments to the articles, Cummins also drafted all resolutions, planned the procedure for the stockholders' meeting of April 8, 1890, and as he said parcelled out the resolutions among the members who were present to be offered from time to time. (Rec., 1217.)

The record of the meeting shows that among others he attempted to accomplish three things:

*First.* To distribute among the proprietary companies, instead of two million dollars of capital stock to represent their respective interests in the terminal properties, as provided by the agreement of May 10, 1889, four hundred thousand dollars of stock for this purpose, to be divided in exactly the same proportions as provided by said agreement.

In this respect he still left intact the characteristics and the limitations relating to the issue of the capital stock, as provided in Sections twenty-six and twenty-four of the agreement of May 10, 1889. The remainder of the stock in excess of the four hun-

dred thousand dollars was to be issued only by authority of a resolution of the stockholders adopted by the vote of more than seven-eighths of all of the stock theretofore issued.

*Second.* To alter aliquot interests in the common properties from quarters to eighths. In this respect it required the votes of *more* than seven-eighths of all the stock theretofore issued to elect a director; but "to authorize the execution of mortgages, to issue bonds, to enter into contracts, to construct buildings, to make leases, to authorize the institution of condemnation proceedings, and to do all such other things that may be proper or necessary for the corporation to do \* \* \* except the ordinary operation of the property, the board of directors can act only upon the unanimous vote of the eight members thereof." Moreover, a vote of more than seven-eighths of all the stock was required to amend the articles. (Rec., 492-3.)

*Third.* To repeal, strike out and expunge the proceedings of the meeting of the incorporators held December 10, 1884 (being the meeting at which the original articles were adopted), "with certain preambles including a contract executed on the 2nd day of January, 1882." (Rec., 494.)

Before discussing the significance of the above amendments, attention should be called to the fact that the so-called stockholders' meeting, at which they were supposed to have been adopted, was for the reasons hereafter shown, undoubtedly illegal. Of this the majority opinion of the Court of Appeals says that "the claim that the amendments were never properly adopted is well taken, but not open to the complainants," and the reason assigned for the latter conclusion is that the proprietary companies were present at this meeting by authorized agents, and that under such circumstances the *legally* ineffectual attempts to amend articles and ~~pass~~ resolutions amounted in fact to a contractual understanding between them, creating a situation inconsistent with the contentions now advanced by the complainants.

In weighing the reasoning by which such conclusion was reached, it is to be remembered that the interests at issue and supposed to have been disposed of at this meeting, in the manner above stated, were equitable estates in real property vested in the proprietary companies to the same extent from the standpoint of being actually owned and possessed property, as if the legal title to such real estate, as well as the beneficial interest therein, had stood in their respective names. It is beyond question that property rights of such character can be transferred, released or surrendered in the instance of corporations only by corporate action, evidenced by some form of instrument of assignment. In the case of *Brown v. Fletcher* (*supra*) this Court has said that they passed by deed.

In the light of the above principle, the legality of the stockholders' meeting of April 8, 1890, is important for the purpose of determining what in fact could have legally taken place there affecting the *property* rights of the proprietary companies.

The majority opinion of the Court of Appeals says:

"When the corporation undertook to amend its fundamental law, that could be legally done only by the stockholders. There was no stock issued; there was only a right to stock through the contract of 1889." (Rec., 2110.)

The minutes of the meeting show as present in person How, Hayes, F. M. Hubbell, Martin, F. C. Hubbell and Cummins as representing one share each and by proxy, G. M. Dodge by L. M. Martin, representing one share and W. H. Blodgett by J. F. How, representing one share. It is then recited that:

"There was also present the 'Northwestern Company' by F. M. Hubbell, president.

The 'Northern Company' by A. B. Cummins, president.



The 'St. Louis Company' by J. F. How, president."

It was then "determined that all the stockholders of said company were present either in person or by proxy duly filed with the secretary of the company." (Rec., 489.)

F. M. Hubbell testified that neither the stockholders nor directors of any proprietary company had adopted any resolution or had issued any proxy authorizing anyone to be present at such stockholders' meeting of April 8, 1890, or to vote thereat any share or shares of stock of such company. (Rec., 1165-1169.) It is thus apparent that, so far as corporate action of the Des Moines Company is concerned, the resolutions offered at such stockholders' meeting of April 8, 1890, purporting to amend its articles and providing for the issue of its capital stock, were not legally adopted.

But the factors that made the corporate action of the Des Moines Company illegal, also show want of corporate action on the part of the proprietary companies, sufficient to surrender or release to their corporate trustee, their respective estates in common in the terminal properties; for without yet considering what the parties intended to accomplish at the stockholders' meeting of April 8, 1890, it is very clear that Hubbell, Cummins and How could not, either individually or by concerted action, convey away the several estates of their principals. *These principals could alone do this through execution of their own deeds of assignment.* Furthermore, in the sense of severally representing their own companies in the making of a supposed contract at this meeting, these parties could have acted only in an oral manner, for the record in writing there made, even if signed by the parties present, could only purport to represent the sole corporate action of the Des Moines Company.

The intent of the parties in amending the articles of incorporation of the Des Moines Company and the result thereby accomplished, irrespective of the legality of the stockholders' meeting.

(1) *The status of the parties.*

There were no innocent purchasers for value in the transactions had at the so-called stockholders' meeting of April 8, 1890. The relations of the proprietary companies with the Des Moines Company, was not contractual, for the Des Moines Company was an active trustee created by the proprietary companies to conserve their several equitable estates. Likewise, in respect of protecting their common title to and the common use of the terminal properties, each cotenant stood in its relations with its other cotenants in a noncontractual status, for as to their common vested interests, the proprietary companies were made by law reciprocal trustees.

*Rothwell v. Deucers*, 2 Black, 613, at 618.

*Bissell v. Fass*, 114 U. S., 252, at 259.

*Turner v. Sawyer*, 150 U. S., 578, at 586.

*Starkweather v. Jenner*, 216 U. S., 524, at 528.

Thus, as a result of this trust relationship, no cotenant could take advantage of inadvertent or legally insufficient acts of another cotenant to the derogation of its ownership or right of use in the common properties.

It follows therefore that, if the proprietary companies came to the above stockholders' meeting with their rights in the above respect intact, these rights could have been parted with in favor of the Des Moines Company, or of one cotenant as against another only by an act of clear intent and some form of separate or com-

certed assignment in writing, based upon due corporate action and an actual consideration.

*In the absence of the above facts, no estoppel could arise in favor of one as against the others, and if these facts existed the doctrine of estoppel to protect an altered status of interests need not be invoked.*

That all of the above essentials of intent and action were wanting in the transactions of the parties will appear upon analysis thereof.

(2) *The reasons assigned by Cummins for the making of the amendments.*

These reasons were threefold:

(1) He thought it "very wise to have it so arranged that every railroad that might come into the depot in the future might become the owner of one-eighth of the capital stock." (Rec., 1208.)

(It is to be remembered in this respect that the agreement of May 10, 1889, authorized the sale of proprietary interests only in quarters.)

(2) He thought that two millions of capital stock should not be distributed among the stockholders. (Rec., 1208.)

(3) He thought that the articles of incorporation were inconsistent with the contract of January 2, 1882. In this respect he had told the parties "that the contract provided for a title of the property in trust for the three companies which had signed it and for the joint use and occupation" of the terminal properties. (Rec., 1209.) He was therefore of the opinion that in view of the conveyances which had been made to the Des Moines Company and the reimbursement in bonds, and the provision in its articles "for the issuance of capital stock for the remainder of the purchase price, if any, that it was imperative to clear up the title and get rid of any question of doubt respecting the ownership of the Des Moines Union Railway Company and its right to manage its own property. These were the reasons which led up to my suggestion that there ought to be an amendment to the articles of incorporation

that would put this company, beyond any question, in the ownership and control of its property. \* \* \* (Rec., 1210.)

In other words, the situation may be summed up as follows:

*The personal counsel for the Huddell interests, at a time when Huddell had already purchased from the Wabash purchasing committee a two-eighths interest in the stock of the Des Moines Company and was engaged in negotiating for the purchase of a further one-eighth interest in the same, having reached the conclusion that trust estates were undoubtedly provided for by the proprietary companies under the contract of January 2, 1882, and having the belief that the Des Moines Company might have taken title to the terminal properties for the purpose of carrying out these trusts, decided that it would be advisable to alter the articles of the trusts by a "nunc pro tunc" declaration of intent for the purpose of causing it to repudiate retroactively those very obligations, which were the sole excuse for its existence.*

*That is to say, having speculated upon the possible existence of trust estates in the proprietary companies, he intended to remove the cloud in this respect upon the titles of the trustee, the Des Moines Company, by destroying these estates without a penny of consideration to the beneficiaries thereof, without any authority from them, without the execution by them of any instrument of assignment and alone through the form of corporate action of the trustee.*

The evidence of Mr. Cummins, relating to the above subject matters is equivocal. He admits on cross-examination that the trust had never been abrogated, except (as he puts it), "as in the original articles themselves, or the amendment" later made, "increasing the capital stock to two million dollars." (Rec., 1241.) Yet

he repeatedly states that the amendments to the articles attempted to be made at the meeting of April 8, 1890, were not intended to affect titles. "That," he said, "had been effected before." (Rec., 1247.) While the trust was not entirely abrogated (whatever this may mean), the original articles, the conveyances made to the Des Moines Company, and the conduct of the parties, in his view, had partially brought this about. (Rec., 1248.) He was clearing up uncertainties in this respect as he would "in a bill to quiet title to property upon which I might think there was a cloud." (Rec., 1258.) The trust created by the contract of 1882 was destroyed in part, in his opinion, by the articles of incorporation. (Rec., 1244.)

He never stated what part of the trust estate was left or what was the value of this remainder which he proposed to destroy without consideration to the beneficiaries through a repudiation of the same by the corporate action of the trustee.

If the foregoing was his intent, was not his letter of January 7, 1890 (Rec., 1211), to Dodge somewhat disingenuous in stating that the amendments were intended "to clear up the ambiguity and uncertainty with respect to the amount of stock to be issued on account of the original purchase of the company, and to enable the Des Moines Union Railway Company to act in all matters without previous authority of three corporations."

There is no evidence in the record that the proprietary companies or their authorized agents had the slightest idea that the proceedings of April 8, 1890, were intended to terminate a trust or to effect a surrender of trust estates.

Indeed to suggest such an intent is to insult intelligence, for if Hubbell, Cummins and How intended and

tried to surrender at the stockholders' meeting of April 8, 1890, the equitable estates of their principals they were engaged in perpetrating a fraud upon them; since, if this was the nature of the transaction, the proprietary companies not only did not receive a dollar of consideration in exchange for their interests, but they also gave up the distribution among themselves of the entire capital stock of their trustee, namely \$2,000,000, and accepted in lieu thereof, only one-fifth of such stock, namely \$400,000, leaving the remainder to be sold to other railroad companies, thus reducing their stockholding interests in the property, if this was all they were to have, to a relatively small proportion of what was originally intended.

*The result of the amendments, assuming their validity.*

(1) *The amendment dividing aliquot interests into eighths instead of quarters.*

This amendment continues that attribute of the stock of the Des Moines Company consonant with the intent of the parties that stock should represent proprietorship in the terminal properties, for it is to be remembered that under the agreement of May 10, 1889, provision was made for the admission of railroad companies as outsiders to the use of the terminals without the ownership of stock, with the proviso that they should pay rental, which was to be used in reducing the cost of operation among the proprietary companies. If a railroad company, holding an eighth interest in the capital stock of the Des Moines Company, was to acquire thereby no rights of user or proprietorship in the terminal properties, because thereof, why the comment of Mr. Cummins that it would be wise to permit railroads to come in upon the ownership of eighths, instead of quarters?

Unanimous consent of the proprietors was required before stock could be purchased by another railroad company, and likewise this unanimous consent was required before a railroad company, without capital stock, could be permitted to use the terminals. If stock holding as such brought no prerogatives of ownership, why should it be sold to newcomers only in eighths, instead of in single shares.

- (2) *Amendment authorizing the issue of four hundred thousand dollars of capital stock, instead of two million dollars, in proportions identical with those provided for in the agreement of May 10, 1889.*

This amendment left intact, both as to apportionment and characteristics, all the attributes of the capital stock of the Des Moines Company contemplated in the contract of January 2, 1882, in the original articles adopted December 10, 1884, and provided for in detail in the agreement of May 10, 1889, with one significant difference, namely, if the allotment of stock to every proprietary company was not to represent its equitable estate in the terminal properties, the stockholders were voluntarily or unwittingly, *and without consideration*, surrendering the right to have distributed among them the entire capital stock of the Des Moines Company, and were accepting in lieu thereof, an aggregate distribution among them of only one-fifth of its capital stock, with the proviso that the remaining four-fifths might eventually be sold, presumably to other railroad companies. Thus, if they were only stockholders, and not tenants entitled to a common use of the properties, their proportionate interest in the terminals was reduced from one-quarters to possibly one-twentieths.

(3) *Article 15 expunging the proceedings of the meeting of December 10, 1884.* (Rec., 494.)

It is difficult to understand what was expected to be accomplished by the so-called expunging of the proceedings of the meeting of incorporators held six years earlier. Assuming that it is possible to wipe resolutions from records, corporate actions had as a result thereof, will not thereby be given an altered significance.

Intent cannot be made retroactive.

But irrespective of intent, the rule is elementary that existing rights are not affected by changes in the charter or articles of a corporation.

*Woodruff v. Trapnall*, 10 How. (U. S.), 190.

*Curran v. State Bank of Arkansas*, 15 How. (U. S.), 304.

*Hawthorne v. California*, 2 Wall. (U. S.), 10.

If the proprietary companies did not intend to and did not in fact convey their equitable estates to the Des Moines Company by the deeds of the temporary trustees, executed and delivered to it in 1887 and 1888, the action had at the meeting of the Des Moines Company on April 8, 1890, surely did not effect such conveyances. If, on the other hand, Article 15 was intended to be prospective in effect, for the purpose of removing a cloud on titles, it was equally ineffectual. Moreover, it is inconceivable that, if such was the intent of the parties at the time it was adopted, they did not pursue the obviously effective course of executing mutual quitclaim deeds of their equitable estates to the Des Moines Company. To be sure, one cannot understand what would prompt them to do so under an arrangement which would not give them a dollar of consideration for the assignment of their property rights.



In contrast with any such possible corporate action, by amended Article 14, they "approved, ratified and confirmed" in their full and original significance, the conveyances made by the temporary trustees to the permanent trustee, and the issuance of the mortgage bonds in reimbursement therefor, thus reiterating all that they intended to do by virtue of the resolutions of January 1, 1885, and of November 5 and 8, 1887, and the deeds of conveyance made pursuant thereto.

- (4) *The resolution adopted fixing the value of the terminal properties at \$861,257.21, as of the date of the conveyance thereof, instead of \$461,257.21, being the actual cost thereof as recited at the meeting of stockholders of March 31, 1888, and the issuing of \$400,000.00 of capital stock upon the basis of the above value. (Rec., 494.)*

After the amendments to the articles of incorporation were adopted, Mr. Cummins offered a resolution which was unanimously adopted, reciting in substance that there was some uncertainty in the records of the company respecting the purchase price of the terminal property; that it was agreed that the same should be purchased at its fair value, payable partly in mortgage bonds and partly in capital stock; that it was agreed that said property was fairly worth the sum of \$861,257.21 (that is \$400,000 more than the aggregate amount recited in the resolution of March 31, 1888 (Rec., 476), above referred to, to be due the several parties therein named "for money expended for the property acquired for this company," and for which bonds had been delivered in reimbursement), of which purchase price the purchasing committee of the Wabash Company, as the real owner of the St. Louis Company, is entitled to \$470,110.80, the

Northwestern Company \$215,058.40, the Northern Company to \$100,000, G. M. Dodge to \$74,088.01 and Polk and Hubbell to \$2,000; that by a settlement theretofore made, the purchasing committee has received 270 bonds of \$1,000 each, G. M. Dodge 74 bonds, Polk and Hubbell 2 bonds and the Northwestern Company 115 bonds, making in all 461 bonds; that as a further part of said purchase price, the Des Moines Company has paid to the purchasing committee, G. M. Dodge and the Northwestern Company \$257.21; that there still remains \$400,000 of the purchase price yet unpaid to be paid in capital stock; that by agreement between the several persons and corporations owning the property prior to the transfer so much of the purchase price as was to be paid in capital stock was to be divided one-half to the St. Louis Company, one-quarter to the Northern Company and one-quarter to the Northwestern Company; that the articles have been amended to conform to the true intent of the several parties.

It was thereupon resolved:

*First.* That the purchase price of the property originally acquired, be fixed at \$861,257.21.

*Second.* That the payment of a portion of said purchase price, as above set forth, be confirmed and approved.

*Third.* That, to complete the payment of such purchase price, one-half of the stock be issued to the purchasing committee, one-quarter to the Northern Company and one-quarter to the Northwestern Company.

*Fourth.* That proceedings heretofore had, respecting the issuance of capital stock so far as said proceedings are inconsistent with the amendments to the articles of incorporation or with this resolution, are hereby modified.

Certain things are obvious from the foregoing resolution. It is a colorable recital of facts, made in conventional form, to give the stock interests of the several

proprietary companies theretofore issued under the agreement of May 10, 1889, an appearance of being fully paid and of being issued as a substitute for the properties conveyed to the Des Moines Company.

The arbitrary *fixing* of the purchase price of the property "*as of the date of the conveyance thereof*," at \$861,257.21, instead of \$461,257.21, flies in the face of the settlement made between the proprietary companies and the Des Moines Company, pursuant to the resolution of March 31, 1888 (Rec., 476), in which it appeared that the cost of the properties aggregated \$461,257.21, and wherein it was resolved, as provided for by the contract of January 2, 1882, that the temporary trustees should be reimbursed for this amount in the proportion of their several advances by the mortgage bonds of the Des Moines Company. The reimbursement thus provided for had taken place, and the transactions identified with the transfer of title to the trustee company were a concluded subject matter.

The fixing of such purchase price at four hundred thousand dollars in excess of the amount for which the temporary trustees were reimbursed in the bonds of the Des Moines Company, and the identification of the capital stock of such company as a consideration paid to the proprietary companies to represent the values of such excess, is also directly contrary to the resolutions adopted on November 5th and on November 8, 1887, by the proprietary companies, providing that the stock of the Des Moines Company should be transferred together with its bonds "*in lieu for the money advanced*," to purchase the terminal properties and the consummation of this proviso by the issuing of stock pursuant thereto under the agreement of May 10, 1889.

The recitals therefore, above summarized from the

resolution adopted April 8, 1890, are disingenuous and contrary to fact. Whatever their intent be, they must have been ineffectual, for they could not recall a concluded transaction and manufacture corporate assets for stock where none had theretofore existed.

Moreover, that the scheme was disingenuous, and that the purchase price of the property was artificially fixed for the purpose of giving the capital stock to be issued, an appearance of being fully paid, Mr. Cummins himself expressly states. He found that there were 461 bonds outstanding and he added \$400,000 to the actual cost of the terminal properties *as of the date of the conveyance thereof*, because he "thought it would stand \$400,000 without creating any liability upon the part of those who held it to make good for unpaid stock, if the company should get into trouble and fall into the hands of a receiver." (Rec., 1241.) Referring to the equity above actual cost, he said:

"Of course I understand it couldn't have sold for \$400,000 at that time." (Rec., 1240-1.)

The ineffectuality of the resolution, however, upon the theory upon which it was based, is exposed in the distribution of stock in the original proportions contemplated by the trust instrument, namely, in one-half and one-quarters and not on what could have been the only theory of adding stock to bonds to make up an increased purchase price, namely, by prorating stock in the same ratio that bonds were distributed on the assumption that each party, conveying property to the Des Moines Company, should receive his pro rata share of the increased value, representing the purchase price to the Des Moines Company, of such property over and above the actual cost of the same, paid for by the bonds already delivered to him for purposes of reimbursement.

The foregoing amendments could not affect the con-

veyance to the Des Moines Company of the equitable estates of the proprietary companies, which had theretofore continued to be vested in them, for the Des Moines Company as a trustee could not by its own corporate process repudiate or destroy the trust estates. Independent corporate action on the part of the proprietary companies could alone produce such a result. *And as hitherto stated, after the conveyances made by the temporary trustees to the Des Moines Company as the permanent trustee of the trust properties, in the fall of 1887 and the winter of 1888, no deeds, conveyances or assignments of any character were ever made by the proprietary companies, or any of them, to the Des Moines Company of any of their interests in the trust properties and no corporate action for this purpose was ever thereafter had by any of them.*

It is difficult to appreciate how these several companies could be legally present at a stockholders' meeting through the agencies of the above individuals, but, without respect to this query, it is beyond question that any action taken by these persons at such stockholders' meeting of the Des Moines Company must be regarded as identified alone with *its* corporate activities.

Whatever their intent and in whatever capacity each of them may have appeared at such stockholders' meeting, it was not within their power, either by individual or concurrent action, to convey away, release or alter the status of the respective equitable estates in the terminal properties then existing in the proprietary companies.

It is fitting to conclude this subdivision with the statement that Hubbell testified repeatedly to the fact that he never regarded the amendments, supposed to have been made at the stockholders' meeting of April 8, 1890, as having any effect on the title to property or on the value

of the stock. (Rec., 1081.) He relied upon the deeds made by the temporary trustees to the Des Moines Company, the original articles of incorporation, and the agreement of May 10, 1889, which he construed as a lease, as establishing in the Des Moines Company the beneficial interests which gave his stock holdings value. (Rec., 1075, 1083.)

(5) *The amendments to the articles were not published so as effectively to eliminate the contract of January 2, 1882, from the original articles of incorporation.*

Finally and wholly apart from all other infirmities in the alleged proceedings for the amendment of the articles of incorporation, we insist that the proceedings taken were wholly ineffectual to discharge the Des Moines Company from its charter obligations to observe the trust created by the contract of January 2, 1882, by virtue of the incorporation of said contract in its articles as a part of its organic law.

By Chapter 88 of the acts of assembly of Iowa of 1888, in force April 8, 1890, it is provided:

"That any of the provisions of the Articles of Incorporation may be changed at any annual meeting of the stockholders or special meeting called for that purpose; but said changes shall not be *valid* unless recorded and *published* as the original articles are required to be; and said changes in the articles need only be signed and acknowledged by the officers of said corporation."

Pursuant to the above provision, the Des Moines Company published notice of the amendments to its articles, and this published notice, which appears in the record as Exhibit 614 (Rec., 2010), contains no reference whatever to the new article 2, supposed to be substituted in place of the original article 2, which contained the provision that

"All the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract (recited in the preamble of the articles), entered into on the 2nd day of January, A. D. 1882."

We submit, therefore, that the above provision of the original articles is in full force and effect, and has been in no manner or to no extent impaired by the supposed amendments of April 8, 1890.

The above conclusion is fortified by what the Supreme Court of Iowa has said respecting the effect of these amended articles. In *Morgan v. Des Moines Union Railway Company* (the Des Moines Company here), 113 Ia., 561, the question of the powers of that company was in issue. The court, after quoting article 2 of the original articles, states:

"These articles were afterwards amended, but in no way was the language set out qualified in the amendment."

It is also to be noted that Judge Wade of the District Court, in referring to the amendment to the articles of incorporation, says:

"It does not appear that it was intended to affect any right then existing, and even if such intention existed on the part of anyone, it was not manifest, and I find nothing which would give it effect." (Rec., 2047.)

The independent transactions of F. M. Hubbell in respect of the trust properties.

That it was farthest from the intent of the purchasing committee or of the defendants to repudiate or destroy the trust estates, is demonstrated by the contemporaneous transactions taking place between Hubbell and the purchasing committee, set out in full in the third subdivision of the statement of facts, and now to be commented upon.

The above transactions resulted in two successive purchases by Hubbell from the purchasing committee of the Wabash Company of first, a quarter interest in the stock of the Des Moines Company, of which General Dodge took one-half, thus vesting in each of these parties an eighth interest in such stock, and second, a further purchase by Hubbell from the purchasing committee of an eighth of the total amount of stock of the Des Moines Company, thus leaving the purchasing committee of the Wabash Company with only an eighth interest in the Des Moines Company, instead of its original one-half.

In considering the significance of these transactions, which thus resulted in the transfer of stock ownership, it is very important to note that Dodge and Hubbell became but the channel by which the one-eighth interest, acquired by Dodge, and the two-eighths interest acquired by Hubbell, were transferred at the inception of its existence, to the consolidated corporation composed of the union of the Northern and Northwestern Companies and controlled by Hubbell and Dodge, Hubbell owning approximately six thousand out of ten thousand shares of this company. Thus, these transactions were not the source of the five-eighths stock holding interest which Hubbell now has in the Des Moines Company and upon which he bases his claim to control the corporation.

The foregoing is important in a determination of what both Hubbell and Ashley, in their negotiations, understood to be the nature of the property interests evidenced by the capital stock of the Des Moines Company. The correspondence and transactions of the parties, relating to these stock transfers, is set out in full in subdivision III of the statement of facts and particular attention is called to the same.

On June 12, 1888, Hubbell wrote Ashley, asking permission to offer for sale a quarter interest in the Des



Moines Company to parties making inquiry of him. (Rec., 1059.) On June 16, 1888, Ashley replied stating that he thought the purchasing committee would be glad to sell a one-quarter interest, but that he had always supposed "that it would be necessary to confine the sale to such railway companies as could be interested in the station." He mentioned the Chicago and North Western Ry. Company and further said:

"was there not an understanding or agreement as to the sale of the stock when the terminal company was formed and would it not be prejudicial to the interest of the whole to part with the stock to outsiders." (Rec., 1059.)

On June 18, 1888, Hubbell replied:

"I agree with you that the sale of a quarter interest in the stock of the terminal company should be made only to a railway company, who will join with the Wabash in making a contract with the Des Moines Union, guaranteeing the interest upon the bonds and operating expenses, etc. \* \* \* I understand it, as you do, that the stock cannot be sold without consent of the different railroad companies who now form the Terminal Company." (Rec., 1060.)

At this juncture it is at least clear that Hubbell was working in harmony with the conception that stock could only be sold in one-quarter interests and must eventually be held by railroad companies who would thereby enter the terminal enterprise on a parity with the original proprietors. This idea was in exact harmony with the intention constant with the proprietary companies, that stock should be identified with ownership and therefore should represent an aliquot estate in the tenancy in common.

Later in the year 1888, Hubbell unsuccessfully attempted to persuade the purchasing committee to surrender a one-quarter interest of the stock to the Des

Moines Company, presumably to enable that company to sell the aliquot portion of the estate represented by it to another railroad company. In February, 1890, Hubbell obtained from Ashley an option to buy \$135,000 of the bonds and a one-quarter interest in the capital stock of the Des Moines Company for \$135,000 (Rec., 1599), and as a result of this option, Dodge and he acquired from the purchasing committee each an eighth interest in the stock of the Des Moines Company. (Rec., 1601.)

Memoranda of agreement in identical form, made between the purchasing committee and Hubbell and Dodge respectively, relating to these one-eighth stock transfers, are very important. This memorandum recites that in the articles of incorporation of the Des Moines Company, it is provided that the Wabash Company shall nominate four directors; that the stock of the Des Moines Company is now held by different parties and in different proportions from what it was when said articles were adopted, and that it was agreed therefore, between the purchasing committee and Hubbell (and Dodge) who had acquired a one-eighth ownership of the stock of the Des Moines Company that the purchasing committee would consent to such change in the articles of the Des Moines Company as would permit one director to be nominated by any person or corporation holding one-eighth of the stock of the Des Moines Company. (Rec., 1601.)

In other words, the parties controlling the three proprietary companies had agreed that thereafter aliquot estates in the common tenancy might be transferred in eighths, instead of quarters. This is what was cared for as before shown in the amendments made in the articles of the Des Moines Company.

In the last transaction had between Hubbell and the purchasing committee, it conclusively appears that both

parties always understood ownership of stock to be identical with ownership of property, and that in this respect, an eighth interest would be sufficient to represent a proprietorship, for they expressly said so.

At the time of the foregoing transactions Hubbell began negotiating with the purchasing committee of the Wabash for the purchase of an additional one-eighth share of its interest in the Des Moines Company. On April 1, 1890, he wrote Ashley, asking the terms upon which such one-eighth interest could be purchased. (Rec., 1061.) On April 5, 1890, Ashley replied, giving his price with this statement contained in his letter:

"IT MUST BE UNDERSTOOD, OF COURSE, THAT A ONE-EIGHTH INTEREST IN THE CAPITAL STOCK SHALL BE SUFFICIENT TO REPRESENT A PROPRIETORSHIP IN THE COMPANY ACCORDING TO THE UNDERSTANDING WE HAD WHEN YOU WERE HERE." (Rec., 1063.)

On these terms Hubbell consummated the purchase of the additional one-eighth interest in the Des Moines Company. When certificates of stock were eventually issued by the Des Moines Company a one-eighth interest was issued to Hubbell, a one-eighth to Dodge, and a few months later an additional one-eighth was transferred to Hubbell; and as before stated, on the consolidation of the Northern and Northwestern Companies on October 12, 1891, these two parties transferred their interest in the Des Moines Company to the consolidated company, thereby giving that company with the original two one-quarter interests, derived from its constituent companies, a seven-eighths interest in the estate in common. (Rec., 1461.)

It is contended by counsel for the defendants that the sale by the purchasing committee of an aliquot portion of its stock in the Des Moines Company to individuals, represents an anomaly in the contention that stock

was intended to evidence proprietorship in the trust properties, and that, therefore, the purchasing committee perpetrated a disingenuous transaction upon Hubbell. The answer to this proposition is very clear. It is true that the scheme contemplated, that railroads alone could be proprietors in the common enterprise, as is shown by Section twenty-four of the agreement of May 10, 1889, and could only become such upon unanimous consent. Still this is not to say that, with all parties agreeing and having full knowledge of the situation, Hubbell could not have been made a proprietor to the extent to which persons, as distinguished from railroads, might be able to benefit thereby. *It is to be remembered that the character of the beneficial interest that Hubbell and Dodge acquired in the stock transferred to them, is not on trial and should have no bearing or influence in this case. Hubbell presumably wished to acquire such stock for a sale at a profit to other railroad companies who might seek to use the terminals, and he and Dodge in fact became merely the channel by which they did transfer at a profit their respective interests to the proprietary company controlled by them; but whether or no the transfers of stock to Hubbell and Dodge were anomalous in the sense that there could not be vested in them as individuals that character of beneficial interest in the common estate which could only be enjoyed by railroad companies, it is beyond question that this anomaly had no equivocation of a character that could possibly destroy the proprietary estate of the purchasing committee as the successor of the St. Louis Company, as long as it was expressly agreed between the parties "that a one-eighth interest in the capital stock shall be sufficient to represent a proprietorship in the company."* (Rec., 1603.)

It is appropriate to conclude this subdivision by calling attention to the annual reports that were made by

the Des Moines Company for purposes of taxation to the executive council of the State of Iowa, on December 31, 1888, 1889 and 1890, and on January 1, 1892, and 1893. In each of these reports appears the following:

“The Des Moines Union Railway Company is simply a ‘Representative Company’ acting as an agency at Des Moines for the Wabash Railroad Company, the Des Moines and Northwestern Ry. Co., and the Des Moines and Northern Railway Company, performing all the necessary work for them and charging each road at actual cost, its due proportion of the expense, thereby incurred.” (Rec., 731.)

The officers of the company verified these reports, and in the instance of 1891, F. C. Hubbell was the verifying president. (Rec., 721, 723.) It is significant that the report signed and verified on February 16, 1894, immediately succeeding the transaction of January 29, 1894, by which Hubbell acquired his five-eighths interest in the Des Moines Company, states that the Des Moines Company “is the owner of the property hereinbefore described.” (Rec., 724.)

## V.

"THE SERIES OF ACTS AND CIRCUMSTANCES" THROUGH WHICH, IN THE MAJORITY OPINION OF THE COURT OF APPEALS, THE PROPRIETARY COMPANIES ARE SUPPOSED TO HAVE "GRADUALLY LET SLIP FROM THEM THE EXCLUSIVE OWNERSHIP AND CONTROL WHICH THEY HAD AT THE BEGINNING SO MUCH VALUED AND SO CAREFULLY GUARDED" WERE ALL IN HARMONY AND CONSISTENT WITH THE CONTINUED EXISTENCE OF THEIR RESPECTIVE PROPRIETARY INTERESTS.

THESE ACTS AND CIRCUMSTANCES ARE TO BE INTERPRETED IN THE LIGHT OF THE FOLLOWING PRINCIPLE, NAMELY, THE EQUITABLE INTEREST THAT EACH OF THE RAILWAY COMPANIES, PARTY TO THE CONTRACT OF JANUARY 2, 1882, ACQUIRED IN THE TERMINAL PROPERTIES OF THE DES MOINES COMPANY WAS MORE THAN A RIGHT IN PERSONAM OR CHOSE IN ACTION—IT WAS A RIGHT IN REM, NAMELY, AN ESTATE IN PROPERTY VESTED IN THIS RESPECT TO THE SAME EXTENT AS THOUGH THE LEGAL TITLE THERETO HAD BEEN CONVEYED TO SUCH COMPANY.

The conclusions reached in the majority opinion of the Court of Appeals are based upon the premise of the existence of a trust and the loss by the beneficiaries of this trust, without their design or intention, of all their rights under the same through successive acts on their part "natural," "harmless" and inadvertent. In the above respect the Court said:

"(a) The title contemplated was a trust. The legal title to be 'in a trustee to be named by agreement of said companies.' The beneficial estate to be in the three companies in proportion to the parts each contributed to the payment therefor." (Rec., 2096.)

"(b) Thus the railways themselves had, through a series of acts and circumstances extending over many years, gradually let slip from them the exclusive ownership and control which they had at the

beginning so much valued and so carefully guarded." (Rec., 2114.)

"(c) There is nowhere any indication that the railways intended any such result, and yet such, in our judgment, is the result. This unexpected outcome was the product of several circumstances." (Rec., 2113.)

Judge Hook in his dissenting opinion has the following to say of the position of the majority:

"In both aspects of its position towards the proprietary companies the terminal company was in a high sense their trustee; and according to salutary principles it was bound to maintain the integrity of that relation. Being itself a corporation, its fiduciary obligations and disabilities rested equally upon its officers through whom alone it could act. The limitations upon the right of a person in such a capacity to act for his personal benefit with respect to the subject of the trust are familiar. Never are they less than that the dealing must be open, avowedly at arm's length, and without contrivance or concealment. The individual defendants, one or the other or both, were, at all the times material in this case, officers and directors of the terminal company. The conclusion of my brothers, briefly stated, is that by a series of transactions occurring in a long course of years the original character of the terminal company was gradually changed into that of an independent corporation, and that the control of it was lost by the railroad companies and was acquired by the individual defendants who were its officers. But they say: '*There is nowhere any indication that the railways intended any such result, and yet such, in our judgment, is the result. This unexpected outcome was the product of several circumstances.*' In other words, the proprietary companies were not cognizant of the trend of the circumstances, and the result held to follow, though unexpected and not intended by them, is enforced because of a legal presumption of intention of natural consequences of acts, regardless of intention in fact. The circumstances relied on do not appear to me to have the

significance attributed to them, but were it otherwise the presumption should not be so broadly applied to the case of a trust the destruction of which is claimed by those subject to the disabilities of trustees dealing for themselves. *The excerpt quoted above touches the quick of this controversy.* In my opinion the various transactions thought to produce a result so unexpected and unforeseen should be severally examined in the light of the surroundings at the time they occurred. If in one aspect they were then consistent, or not apparently inconsistent, with the frequent and studied declarations of the object of the terminal organization and that view was then reasonably entertained by the railroad companies, that view should prevail in a court of equity rather than a shrewder one tending to a conclusion in favor of participants who were bound in good conscience to the contrary." (Italics ours.) (Rec., 2119.)

A sufficient answer to the theory upon which the conclusions in the majority opinion are reached ought to be that it is based upon a fundamentally erroneous conception of the principle of law, applicable to the status of the parties. It is assumed that, upon the creation of the Des Moines Company designed as the corporate entity to hold legal title to the terminal property owned by the proprietary companies, the future relations between that company and the proprietary companies would be contractual. Such was not in any respect the essence of this relationship, for properties charged with a trust are "held—not in opposition to but—for the benefit of the beneficiary." (*Brown v. Fletcher*, 235 U. S., 589.) Thus, in equity the parties were, in respect of the trust proprietors, one and the same. (Pomeroy's Equity Jurisprudence, Fourth Edition, Section 975.) Beneficial estates, established and reserved upon such a principle of law, cannot be lost by inadvertence to the very party created to hold them intact, for a conveyance to it, the trustee, is in fact



a conveyance to the *cestui*. This principle is the true guide to a proper interpretation of the "series of acts and circumstances" relating to the trust properties.

This series of acts and circumstances upon which the majority opinion of the Court of Appeals relies for its conclusions is as follows:

(1) *The Articles of Incorporation of the Des Moines Company adopted December 10, 1884.* (Rec., 416.)

These articles are based upon the premise that the Des Moines Company was organized for the sole purpose of making effective the trust created by the contract of January 2, 1882; for the resolution of the incorporators adopting them so recites, the contract of January 2, 1882, is set forth in them as a preamble to their provisions, and article 2 thereof provides that all the powers exercised by the company shall be in accordance with the terms and spirit of said contract.

After the concentration of the trust properties in the company organized for the above purpose, no equitable tenant in common in such trust properties ever conveyed, released or otherwise relinquished to it its equitable estate therein.

(2) *Deeds of Conveyance.*

By article fifth of the contract of January 2, 1882, the temporary trustees declared that the purchases made by them were made in their names upon the trusts set up in said instrument, and they agreed to quitclaim and convey the same to the permanent trustee, provided for by such instrument, upon demand and reimbursement. Their several deeds of conveyance of the properties so acquired by them were premised upon resolutions of the

respective proprietary companies and of the Des Moines Company, adopted for the purpose of vesting the terminal properties in the Des Moines Company as the permanent trustee thereof under the provisions of the contract of January 2, 1882.

(3) *The Mortgage of the Des Moines Company.*

It is stated that, since the Des Moines Company was required to make a mortgage upon the properties to which it took title to reimburse the temporary trustees for the cost of the purchases made by them, it must be presumed that the Des Moines Company took not only the legal but the beneficial interests in the properties conveyed to it. Such a statement ignores the principle that the attributes of a trust are to be limited alone by the intent of the parties setting up the same. Trustees may be given powers to sell and reinvest the proceeds of trust property, and to mortgage the same in the interests of the trust estate. The term "trustee" and the term "reimbursement" were used advisedly in the fifth article of the contract of January 2, 1882. It was the clear intent of the parties by their deliberate expression in that contract that a "trustee" should take title to the properties, that a "trustee" should mortgage these properties and issue its bonds and that a "trustee" by means of these bonds should "reimburse" the temporary trustees for the advances made on account of the terminal properties. Thus, the making of the mortgage by the Des Moines Company, the issuing of the bonds thereunder and the delivery of the same to the temporary trustees of the terminal properties in exchange for the deeds of conveyance were a literal compliance with the provisions of the contract of January 2, 1882.

(4) *The Supplemental Agreement of May 10, 1889.*  
(Rec., 479.)

This agreement had its inception in a resolution adopted at a stockholders' meeting of the Des Moines Company on March 31, 1888. (Rec., 476.) It was resolved that the proprietary companies shall "pay the operating expenses, taxes and interest on bonds that are or may be issued, after deducting any amount received from other sources for rental, prorated on a wheelage basis, and that said payments, including interest charges shall be made monthly." It was further resolved "That Colonel W. H. Blodgett be requested to prepare an agreement for thirty years from May 1, 1888, based on the above resolution and covering in detail the conduct and operation of the Des Moines Union Railway Company. Said agreement to be approved and executed by all the lines now holding an interest in the property.

Said agreement shall provide that if, at the end of six months from the date of the same, either party to the contract shall feel that the terms of the same are unjust to them, and give notice to that effect, it shall be a matter for readjustment." (Rec., 478.)

And it was also resolved "that the terms and conditions on which the several lines now interested, or which may hereafter become interested, shall enjoy the use of these terminals, be fully set forth in a *supplemental agreement* to be made and executed between the Des Moines Union Railway Company and each of the lines using the said terminals." (Rec., 478.)

Of the necessities for this agreement, Col. Blodgett, who drew the same, said:

"A. It was considered necessary to have something in addition to the agreement of January 2, 1882, for these reasons: In the first place the agreement

of January 2, 1882, made no provision for the payment of interest and did not provide how the interest charge should be distributed among the railroad companies using the property. That was one reason. Another reason was, that the contract of January 2, 1882, did not obligate the railroad companies who were parties to it or their assigns to use the terminal.

Q. Or pay interest?

A. Not pay the interest. Let me see—there was the interest charge and the matter of using the property, and then the contract of January 2, 1882, put everything, all the expenses of maintenance and operation of all the property on a wheelage basis, and Mr. Hays and General Dodge and all the parties interested thought that the cost of operating the roundhouses should not be on a wheelage basis, but should be distributed among the railroad companies according to the number of engines that were housed and taken care of for each company; and those were the three things wherein, I think, the contract of May 10, 1889, differed from the contract of January 2, 1882.

Q. It was to cover those points?

A. It was for those reasons that all parties agreed it would be advisable to have a supplemental agreement." (Rec., 366-367.)

He also called attention to the fact that, in respect to the payment of the interest on the mortgage bonds of the Des Moines Company, the contract was to be made retroactive from May 1, 1888, and that the thirty-year period of its proposed existence was to be identical with the time in which the bonds of the Des Moines Company were to be outstanding. (Rec., 367.)

It is to be observed that at the date of this meeting of the stockholders of the Des Moines Company, a date subsequent to the conveyance of the terminal properties to the Des Moines Company, and to the execution of the Des Moines Company's mortgage, all of the parties distinctly recognize the continuing existence of the con-

tract of January 2, 1882, as it is elementary that a supplemental agreement presupposes the continuing force and vitality of the instrument upon which it is based.

From the above, it is also apparent that the agreement of May 10, 1889, was intended to be merely a regulation of the joint relations of the proprietary companies in the use of their common properties. This is evident not only because Col. Bledgett so states, but because the proprietary companies were resolving not separately but in the form of a resolution adopted by their corporate trustee that they should bear the operating expenses, taxes and interest charged upon their own properties, with the proviso that, if at the end of six months any one of them should regard the terms of the contract unjust, notice should be given to that effect and it should be a matter for readjustment; and that the agreement should be a "*supplemental agreement*," thus intending to keep in full force and effect the contract of January 2, 1882, and to supplement it with details necessary to make possible a harmonious joint user of the terminal properties by its three proprietors.

In objection to the above, it is stated that the preambles of the contract recite that the Des Moines Company became incorporated and organized under the laws of the State of Iowa, for the purpose of owning and operating a line of railway in the City of Des Moines, etc. (Rec., 363.)

Judge Hook, in his dissenting opinion answers the foregoing by saying that

"in a preamble it was recited that, in pursuance of its charter, it acquired and owned a railway. The charter was that of 1884, into which the contract of 1882 was written." (Rec., 2121.)

An analysis of the terms of the contract also discloses

a recognition of the proprietorship of the second parties thereto in the terminal properties.

(a) No rental was required of the second parties; whereas, it provided for the payment of rental by other railroads who (without becoming stockholders) might be admitted to the use of the terminal properties with the unanimous consent of the second parties.

(b) The Des Moines Company was not intended to acquire revenue over and above its cost of operation, as amounts derived from other railroad companies were to be used to reduce the expense of operating the terminals assumed by the proprietary companies.

(c) The proprietary companies were to assume the control and operation of the Des Moines Company, through an executive committee of three, each of the three proprietors to have one representative. The executive committee was to appoint the superintendent of the properties and to make and enforce the rules and regulations for the use, management and operation of the terminals.

(b) Sections twenty-four and twenty-six identified the second parties to the agreement as proprietors of the properties, by providing the terms and conditions under which stock in representation of their proprietary interests was to be allotted to them, and in identifying the ownership of stock with the right of use and occupation.

(c) If an outsider should default in its obligations, the second parties were to reimburse the first party on a wheelage basis for the amount of such default, thus showing the responsibility of proprietors to protect their own interests.

The foregoing shows that the agreement of May 16, 1889, was made supplemental to the contract of January

2, 1882, for the purpose of settling the details of operation and accounting among the proprietors until May 1, 1918.

(5) *The issue of capital stock.*

The subject matter of the issue of capital stock has already been fully developed. The record shows that it was neither issued to reimburse the temporary trustees or their beneficiaries for advances made by them in acquiring the terminal properties, nor distributed in relation to such advances, but was issued in exact accord with the contract of January 2, 1882, and of the supplemental agreement of May 10, 1889, with the intent that it should represent the several aliquot estates of the proprietary companies in the common tenancy.

(6) *The Amended Articles of Incorporation.*

Full comment has been made upon this subject matter under title IV of this brief.

(7) *The agreement of July 31, 1897. (Rec., 506.)*

The sole object of this agreement was to make the Wabash Railroad Company, as successor to the St. Louis Company, and the Des Moines, Northern and Western Railway Company (the consolidated company) as successor to the Northwestern and Northern Companies, parties to the supplemental agreement of May 10, 1889. It is therein stated that so much of said contract "as relates to the *issuance and distribution* of the capital stock of said Des Moines Company is no longer binding and that the capital stock of said Des Moines Company is held as follows:" Thereafter, F. M. Hubbell & Son is listed, among others, as holding twenty-five hundred shares.

It is contended that this latter recital is a statement made by the Wabash Railroad Company inconsistent with the continuance of the trust established by the contract of January 2, 1882.

The above may be answered by saying that since it is an attribute of common tenancies that each title holder therein, irrespective of his proportionate interest, has a right of user of the common premises on a parity with all other tenants in common, the assignment by a proprietary company of an allotment of stock to an individual instead of to another railroad company is certainly not an act inconsistent with the continued existence of a proprietary interest in the terminal properties in such railroad assignor to the extent of any aliquot share of the same still held by it; and that the nature of the interest of an individual stockholder, assuming his rightful ownership of such stock in the terminal properties, is not on trial here.

Furthermore, the statement quoted from the above contract has a significance directly contrary to that contended for by the defendant. The sole object of the contract was to bring the consolidated company and the Wabash Company within the terms of the supplemental agreement of May 10, 1889. If stock in the Des Moines Company was not intended to represent proprietary shares in its properties, it would have been idle and irrelevant to recite in such contract its distribution and ownership. The purpose of this recital was undoubtedly to lock up, so to speak, the successor companies as tenants in common with the remaining tenants in common in said property in respect of their joint and several obligations. Finally it may be noticed that no allusion was made to the agreement of July 31, 1897, in the opinions of the court below except in the majority



opinion in connection with the disposition of the surplus earnings, where as affecting these earnings the majority opinion states :

“A subsequent contract of July 31, 1897, does not affect this controversy.” (Rec., 2114.)

## VI.

TO GIVE THE ACTS AND CIRCUMSTANCES HEREINBEFORE ENUMERATED A CONSTRUCTION OR ASPECT IN DEROGATION OF THE EQUITABLE ESTATES IN COMMON OF THE PROPRIETARY COMPANIES, PURSUANT TO THE CHARACTERIZATION THEREOF, OF THE MAJORITY OPINION OF THE CIRCUIT COURT OF APPEALS, WOULD BE TO PERMIT TRUSTEES OR FIDUCIARIES, NOT ONLY TO REPUDIATE THE RIGHTS OF THEIR CESTUIS QUE TRUSTENTS, BUT TO ACQUIRE FOR THEMSELVES THE BENEFICIAL INTERESTS IN THE TRUST ESTATES.

The Circuit Court of Appeals in its majority opinion holds that a trust was created under the terms of the contract of January 2, 1882, that the beneficiaries thereunder or proprietary companies at all times intended the continuance of said trust, but that the same, through acts of inadvertence “apparently harmless,” was destroyed, and that the Des Moines Company became an independent corporation holding the trust properties free from the terms of the trust and under the control of the Hubbells.

The principle announced in the title to this subdivision of the brief is to be applied to the conclusions of the Circuit Court of Appeals as above stated. It has application to the parties in interest in their relation to the terminal properties in several aspects, namely :

(1) To the Des Moines Company and to any officer, director or agent thereof, making a claim on its behalf or to his own advantage inconsistent with the rights or

interest of the proprietary companies as beneficiaries of the trust assumed by the Des Moines Company.

(2) To any cotenant in the common equitable estate, whether one of the proprietary companies or a successor in interest thereto by assignment of its estate as against the interest of any other cotenant in the common equitable estate.

At all times during the transactions involved in this litigation, F. M. Hubbell was an officer and director of the Des Moines Company and of each of the three proprietary companies and the controlling stockholder of the Northwestern Company and of its successor the consolidated company from which he acquired the five-eighths interest in the stock of the Des Moines Company, upon which he now bases his claim. (Rec., 1296.)

In the above respect he actively participated in the management of the corporate affairs of the Des Moines Company and of the Northwestern and the consolidated companies, and he was, moreover, the individual upon whom the Wabash Company and its successor, the purchasing committee, relied in confidence for the purpose of protecting their interest in the terminal properties at Des Moines.

Therefore, as an officer, director or agent of the Des Moines, he was bound by the terms of the trust and in this respect could not take advantage of any act of a proprietary company in derogation of its beneficial interest in the trust estate. A trustee is not permitted to assert in his own behalf any right or interest in trust properties resulting from the inadvertence of his beneficiaries. (Bigelow on Estoppel, 6th Edition, page 589.)

Likewise, as an officer, director and controlling stockholder of the consolidated company, a successor in interest to an aliquot estate in the properties acquired

to be held and used in common, he controlled the acts of a trustee and was thus bound as a fiduciary, for cotenants occupy to each other the position of express trustees in respect to the property held in common.

In the case of *Bissell v. Foss*, 114 U. S., 252, at page 259, it is said:

"It is true that one of two or more tenants in common, holding by a common title, cannot purchase an outstanding title or incumbrance upon the joint estate for his own benefit. Such a purchase enures to the benefit of all, because there is an obligation between them, resulting from their joint claim and community of interest, that one of them shall not affect the claim to the prejudice of the others. *Rothwell v. Dewees*, 2 Black, 613; *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Lloyd v. Lynch*, 28 Penn. St. 419; *Downer v. Smith*, 38 Vt. 464."

See, also, to the same effect the case of *Rothwell v. Dewees*, 2 Black, 613, at page 618, in which it is said:

"In the case of *Van Horne v. Fonda*, 5 Johns. Chy. R., 407, the rule is very fully laid down by Chancellor Kent, that where two devisees or tenants in common hold under an imperfect title, and one of them buys in the outstanding title, such purchase will enure to their common benefit upon contribution made to repay the purchase money."

See, also, *Turner v. Sawyer*, 150 U. S., 578, at page 586, and *Starkweather v. Jenner*, 216 U. S., 524, at page 528.

The principle announced in the above authorities, which makes one cotenant a trustee for another, where he buys an outstanding title of the common estate, would, of course, apply with peculiar force where one would attempt to acquire a control or title to the common estate as against the other by taking advantage of his unintentional acts in derogation of his title. If the foregoing be true, of course, it also follows that Hubbell, as a successor to the consolidated company in ownership to

a portion of the stock in the Des Moines Company, by a transaction in which he was virtually both seller and buyer, could have rights no greater than the consolidated company, his controlled vendor. Thus, whatever his status as an individual stockholder in respect of the terminal properties of the Des Moines Company, he may not assert thereby a control over the properties of the Des Moines Company inconsistent with the trust estates of the proprietary companies therein.

It is appropriate here to submit to this Court the form of relief which should be awarded the complainants in the enforcement of their proprietary interests in the terminal properties. The trust established by the contract of January 2, 1882, has never been abrogated. The period of the supplemental agreement of May 10, 1889, has expired. The rights of the proprietors should be protected upon the basis of the attributes belonging to their equitable estates established by the original trust instrument, and this Court is, therefore, asked to decree that the complainants are entitled to the use and occupation of the terminal properties in perpetuity, the cost of operation to be divided between them on a basis of wheelage, as provided in Article Sixth of the contract of January 2, 1882. (Rec., 413.)

## VII.

THE FIVE-EIGHTHS STOCK INTEREST IN THE DES MOINES COMPANY HAVING BEEN ACQUIRED BY THE HUBBELLS FROM THE CONSOLIDATED COMPANY, OF WHICH THEY WERE DOMINATING STOCKHOLDERS AND DIRECTORS, IN VIOLATION OF THEIR FIDUCIARY OBLIGATIONS TO THE PROPRIETARY COMPANIES, THE DECREE HEREIN, IN ADDITION TO THE PRIMARY RELIEF ASKED QUIETING THE EQUITABLE TITLES OF THE COMPLAINANTS IN THE TRUST PROPERTIES, SHOULD ALSO PROVIDE FOR A RESCISSION OF THE STOCK TRANSACTION AND FOR A REDEMPTION OF THE SHARES BY THE COMPLAINANTS ON EQUITABLE TERMS.

Enough has already been said to demonstrate the clear right of the complainants to the primary relief asked in the amended complaint quieting their equitable title to the trust properties and protecting them in the use and enjoyment thereof upon the basis of the contract of January 2, 1882.

It is unthinkable that these great public carriers, serving a populous community by means of railway facilities, which they and their predecessors established in the exercise of corporate franchises derived from the State of Iowa, and in a large measure through the aid of grants and subsidies provided by the community itself, should be cut off from the use of these facilities as the result of machinations of their own fiduciary and trustee.

The granting of a decree enforcing alone the right of the complainants to the use and enjoyment as equitable tenants in common of the terminal properties, would, however, leave undetermined a subordinate but important question as to the proper disposition of the shares of the Des Moines Company claimed to be owned by F. M. Hubbell & Son.

It was never intended by the proprietary companies

or their predecessors that any of the shares of the Des Moines Company should be permanently divorced from the beneficial ownership, use and enjoyment of the terminal properties.

By the contract of January 2, 1882, as already pointed out, an undivided quarter interest in the terminals represented a proprietorship thereof, and a one-quarter interest was allotted each to the Northwestern Company and the Northern Company and a one-half interest to the St. Louis Company, leaving in the possession and control of the St. Louis Company a surplus quarter interest which might be sold to another railway company. It was then understood and agreed by the proprietary companies that this surplus quarter interest held by the St. Louis Company might be sold to another railway company desiring to use the terminals, but only sold to such railway company and "not to outsiders."

This agreement was recognized by F. M. Hubbell in his correspondence with Ashley in 1888. (Rec., 1060.) A year later it was definitely incorporated in the supplemental agreement of May 10, 1889, as Section twenty-four thereof. (Rec., 485.)

Afterwards, as testified by A. B. Cummins, the personal counsel of the Hubbell interests, and the general counsel of the Des Moines Company, the proprietary companies determined to broaden the trust enterprise so "that all the railroads in Des Moines could be brought into these terminals" and "that each railroad that might come into the depot in the future might become the owner of one-eighth of the stock." (Rec., 1208.)

This merely involved a redivision of the shares of the trust enterprise into eighths instead of quarters, each interest to be measured by one-eighth of the stock of the Des Moines Company—a division which, as a

glance at a railroad map will show, corresponds precisely to the number of railroads entering Des Moines.

At this juncture, F. M. Hubbell again approached Ashley respecting the purchase of the surplus interest held by the St. Louis Company and in the months of February and August, 1890, he induced Ashley to part with three-eighths of the stock of the Des Moines Company held by the St. Louis Company, upon the distinct understanding "that a one-eighth interest in the capital stock shall be sufficient to represent a *proprietorship* in the company." (Rec., 1602.)

That this transaction was in furtherance of the trust enterprise and not in destruction of it is clear.

That it was not intended that Hubbell individually should permanently hold the stock is equally clear.

In the hands of Hubbell, the stock of the Des Moines Company could have no legitimate value, except for the purpose of resale to other companies who could be admitted with the original proprietors as equitable tenants in common in the use and occupation of the terminals.

What effort, if any, was made by Hubbell to bring in new proprietors does not appear.

It does appear, however, that within a year after the above transaction, Hubbell and Dodge resold at a profit to themselves the three-eighths interest, acquired as above, to the consolidated company formed by the union of the Northwestern and Northern Companies, which it is to be noted was directly in line with the definite understanding of the various parties that shares in the Des Moines Company could only be held by railway companies using the terminals.

For the two-eighths interest sold by Hubbell, he received from the consolidated company its first mort-

gage bonds at par, in the amount of \$60,000, which was at the rate of \$30,000 for each one-eighth interest. (Rec., 1461.)

The shares remained in the treasury of the consolidated company for nearly two years when, together with certain other shares, they were removed therefrom by the Hubbells by successive transactions, to which the attention of this Court is especially directed.

At a meeting of the board of directors of the consolidated company, held October 4, 1893, on motion of A. B. Cummins, a director of that company, and the personal counsel of the Hubbell interests, it was resolved to pledge five eighths of the stock of the Des Moines Company, out of the seven-eighths then held by the consolidated company, as security for certain alleged outstanding notes of that company held by F. M. Hubbell & Son. (Rec., 1480.)

Inasmuch as this pledge of the five-eighths interest in the Des Moines Company was given, or attempted to be given, on the threshold of a receivership, as security for *antecedent* indebtedness of the consolidated company, the pledge was voluntary and without consideration and consequently was invalid. (Jones on Collateral Securities, Section 300a.)

The next step taken by the Hubbells was in the nature of a *pro forma* foreclosure of the invalid pledge.

At a meeting of the board of directors of the consolidated company held January 29, 1894, less than four months after the transaction above mentioned, on motion of A. B. Cummins, a resolution was adopted surrendering to F. M. Hubbell & Son, in satisfaction of a certain part of the consolidated company's alleged note indebtedness the five-eighths interest in the Des Moines



Company's stock at 10 per cent of its face value or at a rate of \$5,000 for each one-eighth interest. (Rec., 1482.)

That F. M. Hubbell abstained from voting either for or against the resolution of the board of directors of the consolidated company is, we submit, of no consequence. He was the president of the company, and he and his firm owned and controlled a majority of its capital stock and he dictated and controlled the action of the directors in all respects. Of the seven members of the board of directors, three (F. M. Hubbell, F. C. Hubbell and H. D. Thompson) were members of Mr. Hubbell's immediate family and a fourth, A. B. Cummins, was the personal attorney for the Hubbell interests.

As F. M. Hubbell himself had valued a one-eighth interest at \$30,000, in the sale made to the consolidated company two years earlier, giving to the five-eighths he took from the consolidated company under the resolution last above mentioned for \$25,000 a valuation of \$150,000, it is unnecessary to argue that the transaction in and of itself was a fraud on the consolidated company, its stockholders, bondholders and other creditors. Moreover, the alleged notes of the consolidated company, which the Hubbells surrendered at their *face* value, in payment for these shares in the Des Moines Company were unsecured, save as they themselves had sought to secure them by the invalid pledge made three months earlier: The property of the consolidated company, including an additional two-eighths interest in the Des Moines Company, was encumbered by a mortgage to the Metropolitan Trust Company of the City of New York, securing an issue of bonds upon which a default was imminent. The notes of the consolidated company, which the Hubbells so surrendered at their *face* value, were junior in equity to the outstanding mortgage bonds, and as to these the record states "that the company had

made strenuous efforts to dispose of the same at 55 per cent of their face value" but had been "wholly unable to do so." (Rec., 1482.)

The immediate purpose of the above transaction was to enable F. M. Hubbell to remove from the treasury of the consolidated company, of which he was the president, a director and the dominating stockholder, certain assets which were unpledged but held by the company in trust for its creditors to apply the same to the full payment of a certain uncollectible indebtedness held by his own firm; thus preferring his own firm over other creditors equally entitled to the benefit of the free assets of the company, including among these creditors the holders of bonds secured by the mortgage to the Metropolitan Trust Company and then unsalable in the market on the basis of 55 per cent of their face value.

The ultimate purpose of the transaction was to place in the possession, and under the dominion and control of F. M. Hubbell, shares of the Des Moines Company, of which he was also an officer and director, to be employed by him in furtherance of a scheme to destroy the proprietary interests of the consolidated company and the Wabash Company in the terminal properties held in trust by the Des Moines Company. At this time he was, it will be recalled, negotiating to sell his interest in the consolidated company to the St. Paul Company.

Against these transactions, the complainants are clearly entitled to equitable relief.

As stated at the outset, it was never intended that the stock of the Des Moines Company should be permanently divorced from the beneficial ownership, use and enjoyment of the terminal properties. Representing, as it unquestionably did, the several proprietary or aliquot interests in the trust properties, each of the proprietary

companies was an express trustee of the other as to the common property held in equitable title and was precluded from dealing with the trust properties or with any interest therein to the injury of one or more of the equitable cotenants. The disability of one equitable cotenant to thus deal with the trust properties is an incident of the reciprocal trusteeship existing between cotenants. (*Rothwell v. Denees*, 2 Black, 613.)

The defendant Hubbell, as an officer, director and dominating stockholder of the consolidated company, had no right to take from its treasury on *any* terms an interest in the Des Moines Company to be employed in his hands to lessen or impair or undermine the interests which that company retained in the Des Moines Company and had pledged to the Metropolitan Trust Company.

The consolidated company had no right to give to anyone, much less to F. M. Hubbell & Son, an interest in the Des Moines Company to be employed in the hands of the taker to lessen or impair or undermine the interests in the Des Moines Company held by the St. Louis Company.

Moreover, in the present instance, each of the equitable cotenants had agreed with the others and with the Des Moines Company that no share in the Des Moines Company could be transferred without the consent of all of the proprietors, and it was further agreed that all stock certificates of the Des Moines Company "shall express upon their face that they are not transferable in whole or in part, without the consent in writing" of the proprietary companies. (Rec., 487.)

That F. M. Hubbell, as secretary of the Des Moines Company, issued the stock certificates of the Des Moines Company, without placing thereon this legend is not disputed.

That F. M. Hubbell never obtained from the St. Louis Company or from the Metropolitan Trust Company, as mortgagee of the consolidated company, a written consent or any other consent to the transfer of the five-eighths interest here in question is also not disputed.

Upon these facts the complainants have a clear remedy.

The original pledge of the five-eighths interest to F. M. Hubbell & Son, having been made without notice either to the St. Louis Company or to the Metropolitan Trust Company, as mortgagee of the consolidated company, and the pledge having been foreclosed without public sale or judicial sale, but under a fraudulent private sale had under action of the board of directors of the consolidated company dominated by Hubbell, a sale made without notice either to the St. Louis Company or to the Metropolitan Trust Company, it follows (viewing the transaction most favorably from the standpoint of the Hubbells), that the shares passed to the Hubbells and have been continuously held by them, subject to redemption on equitable terms by the St. Louis Company and the Metropolitan Trust Company or those claiming under it.

Nor is the right of the complainants to equitable relief barred by laches. The fraud was not discovered until after the institution of this suit, and it is elementary that laches does not operate until the fraud is discovered.

As the proprietary companies and their successors held equitable estates in the terminal property as tenants in common, it was immaterial in respect of their rights of use and occupation of the same which company held the major portion of the Des Moines Company's stock. The Hubbells having diverted and obtained possession of 2,500 shares of the Des Moines Company's stock in violation of their trust obligations, the right to redeem the same belongs jointly and severally to the complainants.

in their status as tenants in common. Therefore, they ask that said 2,500 shares so diverted and held by the Hubbells be surrendered to the complainants upon reimbursement to the Hubbells for the amount claimed to have been paid by them for such shares, to wit: \$25,000, with interest thereon from January 29, 1894.

It will be recalled in this connection that the unanimous vote of the stockholders of the Des Moines Company is necessary to elect a director and that the unanimous vote of the eight directors of the company is necessary for the election of officers. The Hubbells controlled the board of the company and held its principal offices at the time of the institution of this suit and the complainants are unable to dislodge them. They are usurping the several offices they hold in plain violation of the community principle upon which the Des Moines Company was organized and have arrogated to themselves, as individuals, the management of the vast property interests held in trust by the Des Moines Company. As the corporate representative and agency of the proprietary companies, the Des Moines Company has ceased to function and, unless equitable relief in this respect is awarded to the complainants, a dissolution of the Des Moines Company is the only alternative to perpetual domination and control of its affairs by these thoroughly discredited defendants, who assert their control by the suffrage of shares of stock held under a title which is fraudulent *per se* and is voidable by the complainants upon settled principles of equity. In such a situation, affecting as it does not only the rights of these complainants as public creditors but also the vital interests of the City of Des Moines, an application of the well settled principles of equity above developed seems eminently proper and just.

## VIII.

NO FACTS APPEAR IN THE RECORD CONSTITUTING AN ESTOPPEL OR LACHES DEFEATING THE EQUITY OF THE COMPLAINANTS.

That the doctrine of estoppel has no application in this controversy, except as it may operate against the Hubbells, is too clear for argument.

It is fundamental that no man can set up another's act or declaration as a ground of an estoppel, unless he, himself, has been misled or deceived thereby.

Further, as stated by Mr. Justice Field, speaking for this Court in *Brant v. Virginia Coal & Iron Company et al.*, 93 U. S., 326, at page 337:

"It is also essential for its application with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

As F. M. Hubbell was an officer and director in the Des Moines Company and had for years been directing the trust enterprise, his actual knowledge of the condition of the title was certainly as good, in fact far superior to that of the proprietary companies and their representatives. Manifestly, he can claim no estoppel against them.

He, however, by reason of his official relation to the trust enterprise was the principal, if not the only, channel of information available to them in respect thereof. They were entitled to rely implicitly upon any statement

which he might make with reference thereto, and he is estopped to repudiate any such statement.

Take, for example, his dealings with Ashley in 1890 when he acquired the three-eighths interest in the Des Moines Company's stock:

He induced Ashley to part with the stock in question upon the distinct understanding that a one-eighth stock interest "shall be sufficient to represent a proprietorship in the company." He now seeks to repudiate this understanding, but is estopped to do so because, if a one-eighth interest was *not* sufficient to represent a proprietorship,

- (a) Hubbell so represented the fact to Ashley;
- (b) The circumstances were such that knowledge of the truth was imputed to Hubbell; and
- (c) Hubbell thereby induced Ashley to change his position.

There are here present all of the elements of a complete estoppel:

Bigelow on Estoppel, 476.

Herman on Estoppel, 797.

The Hubbells insist, however, that at various times, especially during the period between 1897 and the date of the institution of this suit, the complainants had dealings or negotiations with the Hubbells for an extension of the supplemental agreement of May 10, 1889, and that by reason of these negotiations:

(a) They had induced the Hubbells to believe that the stock in the Des Moines Company represented valuable property rights;

(b) That they had led the Hubbells to believe that they recognized them as the lawful owners of the five-eighths interest in the stock of the Des Moines Company, and

(c) That in reliance upon these representations of the complainants they served with-

out direct compensation as officers and directors of the Des Moines Company for a long period of years solely for the purpose of building up the terminals and making the terminals valuable so as to enhance the value of their stock interest in the Des Moines Company.

We shall refer briefly to these propositions in their order, as stated.

The record discloses no representation on the part of the complainants, or either of them, respecting the property rights represented by the Des Moines Company stock apart from the definite agreement and understanding between F. M. Hubbell and Ashley already mentioned, namely, that a one-eighth stock interest in the Des Moines Company should be sufficient to represent a proprietorship in that company. How valuable such proprietorship may be the complainants do not know and have never stated. They do, however, regard it as an immensely valuable interest and have always so regarded it; and inasmuch as the five-eighths stock interest claimed to be owned by the Hubbells is equivalent to five proprietary interests in the Des Moines Company, it follows that the stock interests claimed to be owned by the Hubbells are very valuable. If their title to this five-eighths interest were good, they could readily dispose of the same to various railway companies whose lines enter the City of Des Moines, a number of which are already using the terminals and paying substantial rentals therefor.

The title under which the Hubbells claim to hold this stock has already been discussed.

Neither of the complainants had any knowledge of the purpose for which this stock had been acquired until Hubbell declared it in 1905, and they had no knowledge as to the character of the Hubbells' title thereto until the



Hubbells themselves introduced in evidence in this suit the records of the consolidated company, to which the attention of this Court has already been directed.

Afterwards the complainants amended the bill so as to obtain a decree setting the transactions aside.

The first definite advice to the Wabash Company of Hubbell's claim to own this stock interest came to it as follows:

Ashley, on behalf of the Wabash purchasing committee, was negotiating to sell certain of the Des Moines Company's bonds when the point was raised that by reason of foreclosure proceedings and reorganizations of the Northwestern and Northern Companies, parties to the supplemental agreement of May 10, 1889, these companies had ceased to exist, and that the reorganized consolidated company, their successor, was under no definite contract obligation to use the terminals and pay its proportion of the interest on the Des Moines Company's bonds. (Rec., 1561.) Ashley at once wrote Hubbell asking that he arrange for the execution of a new agreement with the reorganized consolidated company as a party, the agreement

"to be exactly as before, except that the time must be made to correspond with the life of the bonds, or to be made for a period to extend beyond their maturity." (Rec., 1673.)

Upon receipt of this letter Hubbell wrote Cummins directing that he prepare a new agreement and suggesting certain changes, the significance of which, in the light of subsequent developments, cannot possibly be misunderstood.

We call especial attention to the following suggestions made in his letter to Cummins. He says:

"On page one of the present contract, the extent of the present railway seems to be limited to the

east boundary line of the city on the east and to Farnham street on the west. I suggest that there be no limit either east or west."

The purpose of this we will indicate later.

He further says:

"I think it advisable to have the new contract recognize the ownership of the stock as it now exists, hence the last seven lines of Sec. 24 are unnecessary, as the Wabash Company and the D. M. N. & W. Company, each being bound to always have a director in the D. M. Union Company, can decide whether or not new railroad companies shall be admitted." (Rec., 1674-1675.)

Following the directions contained in the above letter Cummins prepared a new agreement which Hubbell mailed to Col. Blodgett with a letter from which we quote the following:

"Mr. Ashley wanted it sent to you for approval. As soon as it is approved, if you will return it to me I will have it printed in the form of a pamphlet and we will execute it in that form instead of the long sheet written in type.

If you have occasion to amend this contract, please do so as quickly as you can and return it to me and if the amendments are agreed to, we will proceed to print, say one hundred copies, four of which we will execute as originals, one for each party to the contract.

Mr. Ashley is in a great hurry for this contract and I therefore ask you to be as expeditious as possible." (Rec., 1679.)

The draft of contract so prepared by Cummins under Hubbell's directions, and forwarded by Hubbell to Col. Blodgett, contained the following provision relative to the Des Moines Company's stock:

"It is stipulated and agreed \* \* \* that the capital stock of the said Des Moines Union Railway Company is now *rightfully* held as follows, to wit: Purchasing committee of the Wabash,

St. Louis & Pacific Railway Company	500 shares
Des Moines and North Western Com- pany	1,000 shares
F. M. Hubbell & Son	2,500 shares

In spite of Hubbell's obvious anxiety to have the agreement approved and executed without revision, Col. Blodgett withheld his approval. A protracted negotiation ensued, but the parties failed to agree on a new instrument to be substituted for the supplemental agreement of May 10, 1889.

To analyze the correspondence and other data relative to this negotiation would be impracticable.

It is sufficient to say that a careful examination of this evidence will fail to disclose a single fact or representation on the part of the complainants, or their predecessors, which was inconsistent with the continued existence of the trust established by the contract of January 2, 1882.

Failing to agree upon a new agreement to substitute for the supplemental agreement of May 10, 1889, the parties, in order to cover the point originally raised by Mr. Ashley, executed the instrument known and heretofore referred to as the agreement of ratification and confirmation of July 31, 1897. This instrument contains the following provision:

"That so much of said contract, a copy of which is hereto attached (contract of May 10, 1889) as relates to the issuance and distribution of the capital stock of the said Des Moines Company is no longer binding and that the capital stock of the Des Moines Company is held as follows:

500 by the purchasing committee of the Wabash Company, 1,000 by the Des Moines and Northwestern Railway Company and 2,500 by F. M. Hubbell & Son." (Rec., 506.)

This was certainly not an admission on the part of the complainants or their predecessors that the 2,500 shares

referred to were *rightfully* held by the Hubbells, the word "rightfully" inserted in the original draft of agreement submitted by Hubbell having been stricken out by Col. Blodgett. It was merely a recital of the fact not now disputed that the Hubbells then *held* the stock, and the recital was made under circumstances that did not put the Wabash Company upon inquiry as to the validity of their title.

At the time this so-called agreement of ratification was signed, the Wabash Company had no knowledge or no means of knowledge of the transaction under which the Hubbells acquired possession of this five-eighths stock interest in the Des Moines Company, and they had no knowledge or means of knowledge of the fraudulent purpose for which it was acquired until October, 1905. Moreover, at the time the agreement was executed the consolidated company was still under the domination and control of the Hubbells and could not effectively ratify a fraudulent transaction of which the Hubbells were beneficiaries.

The record further shows that after the St. Paul Company had succeeded to the rights of the consolidated company there were further negotiations with Mr. Miller, on the part of the St. Paul Company, and Mr. Ramsay, on the part of the Wabash Company, for an extension of the supplemental agreement of May 10, 1889.

Mr. Ramsay, called as a witness by the Hubbells, testified that he entered into these negotiations without having considered whether the Wabash Company had any right to use the terminals independent of the contract of 1889. Answering the question whether he had heard either of the Hubbells at any time set up a claim that the Wabash Company would not have the right to use that property after the expiration of the contract of 1889, he testified:

"I never heard any such claim set up." (Rec., 1264.)

Moreover, as we have already pointed out, both Mr. Miller and Mr. Ramsay and the other operating officials of the St. Paul and Wabash companies were dependent upon the Hubbells themselves for information respecting the terminal situation.

That the Hubbells, thus situated, cannot claim an effective estoppel by reason of any act or representation of the officials of the St. Paul and Wabash companies, is clear.

If, however, authority is necessary on this point, the case of *Chicago, Milwaukee and St. Paul Railway Company v. Des Moines Union Railway Company et al.*, 165 Iowa, 35, will serve the purpose.

This case grows out of another transaction of the Hubbells in connection with the terminal properties at Des Moines.

The salient features may be briefly stated:

At the time the Hubbells took from the treasury of the consolidated company the five-eighths stock interest in the Des Moines Company, which they now claim to own, they were negotiating to sell their holdings in the consolidated company to the St. Paul Company.

The terminus of the line of the consolidated company was at Farnam street, afterwards 16th street, where it connected with the tracks of the Des Moines Company at the latter's westerly yard limit.

This terminus was so fixed both by the contract of January 2, 1882, and the agreement supplemental thereto of May 10, 1889.

As soon as the negotiations with the St. Paul Company had taken the definite form of a contract, the Hub-

bells moved out the yard limit sign to 28th street so as to include in the terminal properties of the Des Moines Company, and exclude from the properties of the consolidated company, one mile of railway between 28th street and 16th street belonging to the consolidated company.

It was in furtherance of this fraud that Hubbell in his letter to Cummins of December 31, 1896, wrote:

"On page one of the present contract, the extent of the present railway seems to be limited to the east boundary line of the city on the east and to Farnam street on the west. I suggest that there be no limit either east or west." (Rec., 1674.)

Early in 1898, in anticipation of the transfer of their interest in the consolidated company to the St. Paul Company, the Hubbells caused the Des Moines Company to assume possession and maintenance of this mile of railway, and when the consolidated company was transferred to the St. Paul Company the Hubbells represented to the latter that the line of the consolidated company terminated at 28th street.

From that time on until 1907 the Des Moines Company retained possession of and asserted control and ownership of the one mile of railway between 16th street and 28th street.

The true situation was not discovered until 1907 when the St. Paul Company promptly instituted suit to recover the property. The Hubbells resisted the suit and urged there, as they urge here, the plea of estoppel and acquiescence. In rejecting the plea, the Supreme Court of Iowa said:

"The evidence to sustain the plea of estoppel tended to show that, with knowledge of plaintiff (St. Paul Company) and its grantor (the reorganized Consolidated Company) defendant (the Des Moines Company) expended large sums of money in grad-

ing, laying sidetracks, and maintaining the road. These expenses, however, were incurred with knowledge on the part of the officers of the defendants (F. M. Hubbell and F. C. Hubbell) that it did not own the road and that it was in reality the property of plaintiff or its grantor, and, this being so, it could not have been misled to its prejudice by the acquiescence of plaintiff in what was being done, to say nothing of plaintiff's ignorance concerning its title and that of its grantor. That there can be no estoppel under these circumstances is too elementary to require citation of authority."

With this recent expression of the Supreme Court of Iowa, upon an identical state of facts, we might well conclude the discussion.

The Hubbells claim, however, that they have devoted the better part of their lives to the building up of these terminals without compensation and without hope of compensation except such as might flow from the increased value of their stock.

Even if this were true it would not help them for the reason pointed out by the Supreme Court of Iowa.

It is, however, not true.

The record shows that the Hubbells devoted their time and energy to the trust enterprise for a period of fifteen years prior to the time when they acquired stock in the Des Moines Company. They were working then without compensation and were certainly working without hope or expectation of a reward flowing from the increased value of their stock, since they held no stock. The truth is that the management of the terminal enterprise was merely incidental to the real estate operations conducted for many years by the Hubbells under the firm name of F. M. Hubbell & Son. A dominant position in the management of the Des Moines Company gave them a grip upon the development of a great and

growing city; and it was their control and manipulation of the terminal enterprise which enabled them to conduct their real estate operations successfully and profitably, a fact admitted with obvious reluctance by F. C. Hubbell, under cross-examination. (Rec., 1199.) That their real estate operations were successful is not disputed, the vast extent of their holdings of real estate in the City of Des Moines being plainly indicated by the deed to the "Trustees of Hubbell Estate," executed December 31, 1903. (Rec., 681.)

In concluding this subdivision, and also in concluding the argument in number 278, we submit the following propositions, which have a direct materiality to every phase of this controversy:

Estoppel, acquiescence, ratification, laches and kindred equitable defenses, which have been developed by chancellors in furtherance of substantial justice, can never rest securely upon an equivocal state of facts. As stated in Bigelow on Estoppel, 6th Ed., page 641: "*Certainty is essential to all estoppels.*" This is especially true of estoppel by laches. The law does not require a party to come into court to assert his rights until his rights have been clearly, directly and indubitably assailed. This rule is peculiarly applicable to the case of a trust. As pointed out by Mr. Justice Gray, speaking for this Court in *Speidel v. Henrici*, 120 U. S., 377, 386, time does not begin to run against a trust until

"it is openly disavowed by the trustee, insisting upon an adverse right and interest which is *clearly and unequivocally* made known to the *cestui que trust*; as when for instance such transactions take place between the trustee and the *cestui que trust*, as would in case of tenants in common amount to an ouster of one of them by the other."

The complainants have been in undisputed use and enjoyment of the terminal properties continuously since



the establishment of the trust in 1882—originally under the contract of January 2, 1882, *alone*, and subsequently under this contract as supplemented by the agreement of May 10, 1889. At no time did the Des Moines Company by any *clear and unequivocal* action (even at the illegal stockholders' meeting of April 8, 1890), repudiate the trust or indicate any purpose to repudiate it. Nor did either of the Hubbells ever repudiate or question the trust until October, 1905, and promptly thereafter the complainants commenced this suit.

## IX.

THE SO-CALLED SURPLUS EARNINGS WERE PROPERLY AWARDED TO COMPLAINANTS BY THE UNANIMOUS DECISION OF THE CIRCUIT COURT OF APPEALS.

The controversy as to the so-called "surplus earnings" presented in No. 279 will only become material in the event that this Court decides that the complainants have no proprietary interest in the Des Moines Company.

The Circuit Court of Appeals—all judges concurring—held that the revenues received by the Des Moines Company, and referred to as surplus earnings, belonged to the St. Paul and Wabash Companies. The majority opinion based such conclusion upon its interpretation of the supplemental agreement of May 10, 1889, taken as a whole, and the construction placed upon it by the acts of the parties thereto for a series of years following its execution. Judge Hook based his conclusion in the above respect not only upon the grounds above stated, but also upon the broader ground that the increments of the trust properties belonged to the proprietors under the terms of the trust.

Since the opinion of the Circuit Court of Appeals on this branch of the case was unanimous, and since the is-

sue thus disposed of involves no public interest and no rule or principle of law, which public interest requires this Court to determine, it may be that this court will conclude to dismiss as improvidently granted the *writ of certiorari* in No. 279, issued upon the petition of the Hubbells. *Furness Withy & Co., Ltd., v. Yang-Tze Insurance Association, Ltd., et al.*, 242 U. S., 430.

In the contingency, however, of this Court reaching a consideration of the question presented in No. 279, we submit the following brief remarks supplementary to the statement as to this controversy embodied in our preliminary statement of facts:

At the time of the filing of the bill of complaint in this suit, the so-called surplus earnings amounted to approximately \$700,000. (Rev., 102-194.)

Although the record does not show the amount of these accumulations at the present time, the testimony having been taken a number of years ago, it seems proper to state to the Court that these accumulations now amount to approximately two million dollars, or a sum equivalent to approximately 500 per cent of the Des Moines Company's outstanding capital stock.

As explanatory of the large amount of these accumulations, it should be noted that they are in no sense surplus earnings, but are the *gross* receipts of the Des Moines Company for switching, demurrage on cars of the proprietary companies and excess baggage carried by them; and also for rental of parts of its property, principally unused space in the Union Passenger Station and privileges in connection therewith; all of the expenses incident to the production of these earnings being borne by the proprietary companies.

The proprietary companies paid the interest charge on all the capital invested in the terminal enterprise; they

paid the taxes on the Union Station, the cost of heating it and lighting it and operating it; they paid the cost of operating the engine houses and the cost of turning, housing and maintaining the engines, the cost of furnishing water and fire, cost of firing and fueling the engines; in short, all of the operating expenses incident to the creation of the revenues denominated by the Hubbells as surplus earnings were borne by the proprietary companies. (Rec., 320-323.) It was, of course, the intention of the parties that all revenues of the Des Moines Company should be applied in the reduction of operating expenses charged to the proprietary companies, and the agreement of May 10, 1889, was authorized and drawn on this theory. Furthermore the resolution authorizing it provided that if at the end of six months any party thereto should feel that the terms were in any respect unjust and should give notice to that effect, the subject should be one for readjustment.

In the agreement itself it was provided (in Article twenty-eight) that if any question arose respecting any matter *not* provided for in the agreement, the same should be adjusted by arbitration, the arbitrators to "determine what would be just and equitable for each of said parties to do in and about the matter in dispute."

It seems that as early as December, 1889, the question arose as to whether or not these particular revenues should be credited to the proprietary companies under Section four of the agreement, and as soon as receipts of this character arose, the accounting officers of the Des Moines Company, by direction of its executive committee and its president, credited the amount of such receipts upon the monthly bills against the proprietary companies. This was done for a period of nearly two years. (Rec., 272-313.)

Thereupon, as shown in the statement of facts, the board of directors of the Des Moines Company, at a meeting held February 11, 1891, adopted a resolution ordering:

“That the rents collected for the use of the Company's real estate and the switching charges paid in be credited on the bills of the different tenant companies occupying this Company's terminals, giving to each Company its share ascertained by wheelage.” (Rec., 497.)

A year later the board ordered a temporary suspension of the practice pending the accumulation of a small fund for working capital, but distinctly recognized the right of the proprietary companies to receive these revenues. (Rec., 499, 338.)

Thus, the conclusion reached by the Court of Appeals, relating to the disposition of excess earnings, is in exact accord with the interpretation placed upon the provisions of the supplemental agreement of May 10, 1889, by the parties themselves, as disclosed by their acts in the disposition of these earnings, until the Hubbells, in the interest of their claim of corporate control, determined to repudiate this interpretation.

Of course, if the Des Moines Company had undertaken to withhold these revenues from the proprietary companies, they would have at once demanded a readjustment of the matter as being manifestly unjust to them or would have asked that the matter be determined by arbitration under Section twenty-eight on just and equitable principles, and inasmuch as the proprietary companies were paying all the expenses incident to the production of these earnings, their right to receive them could not have been questioned.

The Board itself, therefore, undertook to adjust the matter, and we submit adjusted it properly upon either

one or the other of the following interpretations of its acts.

If it be contended that under a literal construction of Section four of the supplemental agreement of May 10, 1889, it is doubtful whether the same be broad enough to include these accumulations, this doubt was resolved against the Des Moines Company by reason of the practical construction given to this section by the Des Moines Company's board of directors. *Topliff v. Topliff*, 122 U. S., 121, 131.

If, however, it be assumed that these revenues are not covered and disposed of by Section four, then it follows that no definite disposition thereof was made by the supplemental agreement, and the matter was open for adjustment "upon just and equitable" principles by a board of arbitrators under Section twenty-eight. In this situation the board of directors of the Des Moines Company, acting as such arbitrators, deliberately adjusted the matter in the only way it could be disposed of without doing violence to every principle of justice and equity. *Central Trust Company of New York v. Wabash, St. Louis and Pacific Railway Company*, 34 Fed. Rep., 254.

It is submitted, therefore, that the decision of the Circuit Court of Appeals in No. 279 should be affirmed or that the *writ of certiorari* issued therein should be dismissed.

#### IN CONCLUSION.

The complainants ask the following relief:

*In Case No. 278.* (a) That the Court determine that the Des Moines Company took title to all properties vested in it subject to the terms of the contract of January 2, 1882, and holds them in trust for the complainants

herein subject to their joint use and occupation in perpetuity, as provided in said contract. (b) That the defendants F. M. Hubbell, F. C. Hubbell and the firm of F. M. Hubbell & Son be directed to surrender and deliver to the complainants 2,500 shares of the capital stock of the Des Moines Company upon payment to them of the sum of \$25,000, with interest thereon from January 29, 1894, or in the alternative that said F. M. Hubbell, F. C. Hubbell and F. M. Hubbell and Son, and each of them, be perpetually restrained, by the order and injunction of this court, from selling, pledging or otherwise disposing of said shares of capital stock of the Des Moines Company, issued in their names, and that as holders of stock certificates, representing the same they and each of them be restrained by the order and injunction of this court from exercising any control or management of the terminal properties, excepting such as shall be in accordance with the terms and spirit of the contract of January 2, 1882.

*In Case No. 279.* That the decree of the Circuit Court of Appeals be affirmed or, in the alternative, that the writ of certiorari issued therein be dismissed.

All of which is respectfully submitted.

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MAY 19 1910  
JAMES D. BAKER  
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1910

CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY and WABASH  
RAILWAY COMPANY,

Petitioners,

vs.

DES MOINES UNION RAILWAY COM-  
PANY, F. M. HUBBELL and F. O. HUB-  
BELL,

Respondents.

No. 66

DES MOINES UNION RAILWAY COM-  
PANY, F. M. HUBBELL, F. O. HUBBELL  
and F. M. HUBBELL & SON,

Petitioners,

vs.

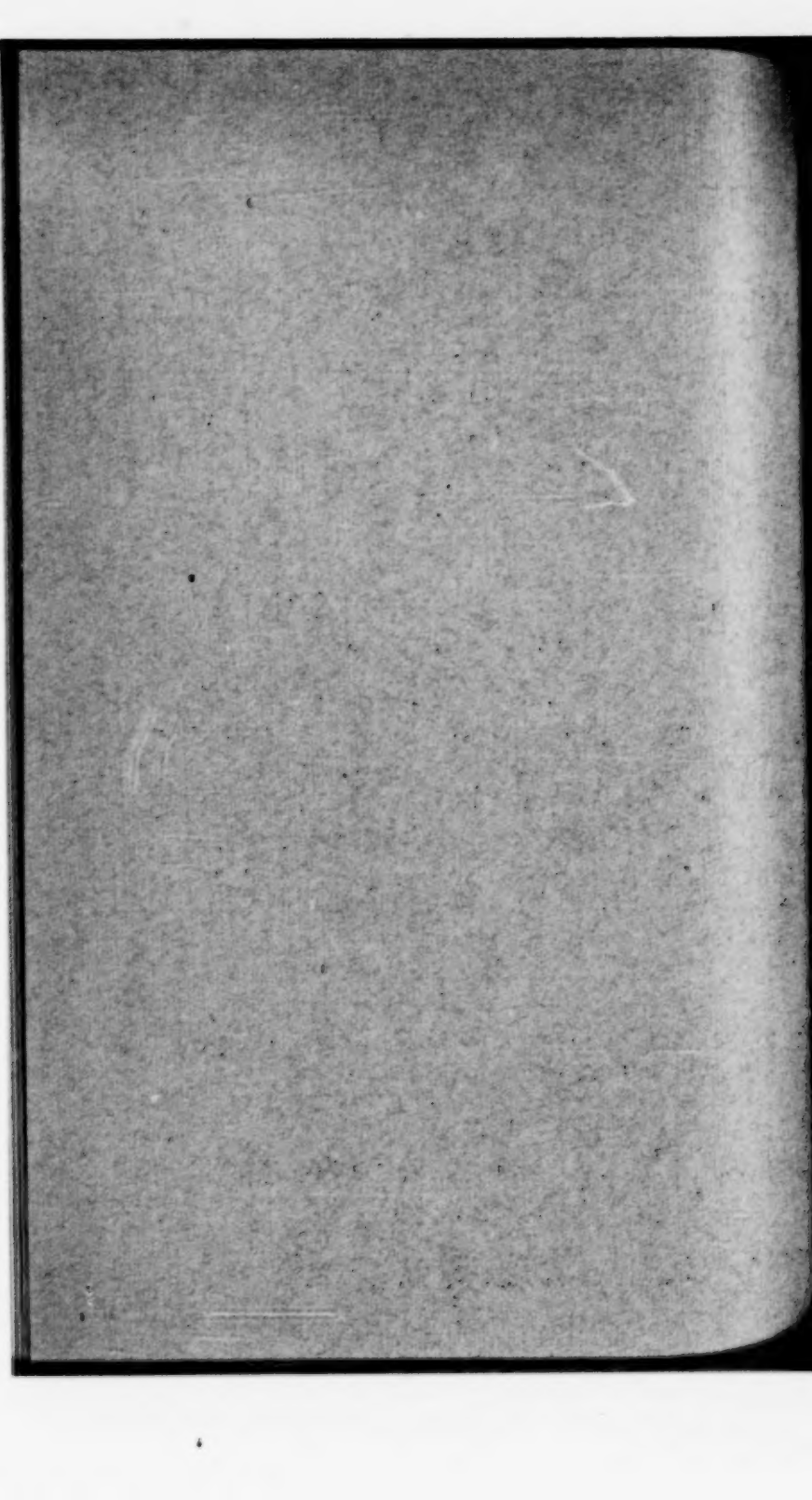
CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY and WABASH  
RAILWAY COMPANY,

Respondents.

No. 67

In Writ of Certiorari to the United States Circuit  
Court of Appeals for the Eighth Circuit.

Statement, Brief and Argument for Respondents in No.  
278 and Petitioners in No. 279





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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1919

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CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY and WABASH  
RAILWAY COMPANY,

Petitioners,

vs.

DES MOINES UNION RAILWAY COM-  
PANY, F. M. HUBBELL and F. C. HUB-  
BELL,

Respondents.

No. 278

DES MOINES UNION RAILWAY COM-  
PANY, F. M. HUBBELL, F. C. HUBBELL  
and F. M. HUBBELL & SON,

Petitioners,

vs.

CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY and WABASH  
RAILWAY COMPANY,

Respondents.

No. 279

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On Writs of Certiorari to the United States Circuit  
Court of Appeals for the Eighth Circuit.

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**Statement, Brief and Argument for Respondents in No. 278**

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These cases present two controversies in one and the same suit brought by the petitioners in No. 278 as com-

plainants against the respondents in that case as defendants, in the District Court of the Southern District of Iowa, Central Division.

One controversy concerns what has been called the Main Issue, which is as to the ownership of certain terminal property at Des Moines, and the other is as to what are called Surplus Earnings, arising under a contract of 1889 for the operation of the terminal properties.

The District Court decided the main issue in favor of the defendants, with a qualification as to which the defendants appealed, and decided the surplus earnings question unqualifiedly in their favor.

The Circuit Court of Appeals decided the main issue unqualifiedly in favor of the defendants and that decision was brought here for review by the petitioners in No. 278. The question of surplus earnings was decided adversely to the defendants and that decision is the subject of review in No. 279.

We shall deal first with the *Main Issue*.

#### STATEMENT OF FACTS.

Prior to 1881 the Wabash, St. Louis & Pacific Railway Company (hereafter sometimes referred to as the "Wabash Company") was the owner of a line of railroad extending from St. Louis northwesterly to Albia, Iowa. The Des Moines Northwestern Railway Company was the owner of a line of narrow gauge railway extending from Waukee, Iowa, a town some ten miles west of Des Moines, northwesterly to Panora, in which railway J. S. Clarkson and others were interested.

These railway companies being desirous of extending their lines to Des Moines and interchanging traffic

therein, the Wabash Company on December 8, 1880, entered into a contract with J. S. Clarkson and others (vol. II, p. 396), providing for the organization of the Des Moines & St. Louis Railroad Company and the building of a line from Albia to Des Moines with funds to be furnished by the Wabash Company. On the same day the Wabash Company also entered into a contract with the Des Moines Northwestern Railway (vol. II, p. 400), looking to the extension of that line to Des Moines and also in a northwesterly direction, and also looking to the use by that company of a terminal in the City of Des Moines to be owned by the Des Moines & St. Louis Railroad Company.

In pursuance of these contracts, the Wabash Company, in the early part of 1881, commenced to acquire property in Des Moines for terminal purposes taking the title in James F. How, who was then Vice-President of the Wabash Company, and charging the money so expended to the Des Moines & St. Louis Railroad Company (vol. III, p. 989).

In April, 1881, there was organized under the laws of Iowa a corporation known as the St. Louis, Des Moines & Northern Railway Company, with power to construct a railroad from Des Moines northwesterly to Boone, Iowa, and thence to the northerly part of the state. This company proceeded to construct a narrow gauge line from Des Moines to Boone, with a branch line from Clive (a station about five miles west of Des Moines), to Waukee.

In January, 1882, it entered into a contract (vol. II, p. 600) with the Des Moines Northwestern Company, by which it sold to that company the line from Clive to Waukee, and a one-half interest in the line from Clive

to Des Moines thereby giving the latter company access to Des Moines.

In the meantime there had been changes in the plans of these companies with respect to the terminal in Des Moines which it was originally intended should be owned exclusively by the Des Moines & St. Louis Railroad Company. In April, 1881, the plan was changed from an ownership exclusively by the Des Moines & St. Louis Company to an ownership jointly by the Des Moines & St. Louis and the Des Moines Northwestern Company (vol. III, p. 989), and later this plan was changed to an ownership jointly by the three companies—the Des Moines & St. Louis, the Des Moines Northwestern, and the St. Louis, Des Moines & Northern. This ripened into the contract of January 2, 1882, (vol. II, p. 411), which set out the terms on which the terminal property should be owned and used by the three railroads.

In the meantime additional terminal property was acquired and improvements made thereon with money furnished principally by the Wabash Company, though some of the money was furnished by General Dodge who was the principal owner of the St. Louis, Des Moines & Northern Company. The title to the terminal property was taken principally in the name of James F. How, trustee, though a small amount was taken in the name of General Dodge, a small amount in the name of the Des Moines & St. Louis Company, and a still smaller amount in the St. Louis, Des Moines & Northern Company.

The Des Moines & St. Louis Company having constructed its line into Des Moines these three railroads or their lessees commenced to use and operate the terminal property jointly, as provided in the contract of

January 2, 1882. That contract provided that the terminal property should be owned jointly by the three railways in the proportions therein stated; that the title thereto should stand in the name of a trustee, who might or might not be a depot company; that it should be policed and maintained by the Des Moines & St. Louis Company, and that the expenses of maintenance and operation should be borne by the users on a wheelage basis.

Thus matters continued until December, 1884, when the representatives of the three railroad companies organized, under the laws of the State of Iowa relating to the organization of corporations for pecuniary profit, the defendant, the Des Moines Union Railway Company, with power to acquire, own and operate a terminal railway in the City of Des Moines, and especially authorized to issue its capital stock in purchasing the terminal property then owned by the three railway companies (see articles of incorporation of Des Moines Union Railway Company, vol. II, pp. 416-23).

Immediately upon the organization of the defendant, the Des Moines Union Railway Company, the three railways parties to the contract of January 2, 1882 at meetings of their stockholders passed resolutions authorizing their officers to transfer to the defendant company the ownership of the terminal property (vol. II, pp. 423-32). These resolutions did not authorize How and Dodge, the trustees, to transfer to the defendant company the legal title to the property, but simply authorized the beneficial owners to convey the ownership. The consideration for the transfer of the ownership was stated in the resolutions to be the bonds and stock of the defendant company.

On the same day the Board of Directors of the defendant company passed resolutions accepting the propositions of the three railroad companies (vol. II, p. 432). However, nothing was immediately done under these resolutions owing, no doubt, to the fact that at about this time the Wabash Company (which was the leading spirit behind all these transactions) became insolvent, its property placed in the hands of a receiver and sold to certain persons known in this record as the "Purchasing Committee." These resolutions were, however, never repealed and were finally acted upon.

Nothing further was done in the matter until in the fall of 1887, when these three railroad companies passed resolutions authorizing How and Dodge, trustees, to transfer the legal title to that portion of the terminal property which they held, to the defendant company (vol. II, pp. 435-43); these deeds to be delivered to the defendant company upon its giving to How and Dodge written agreements that it would deliver to the parties entitled thereto bonds of the defendant company equal in amount to the sums advanced by the Wabash Company and General Dodge in payment for the terminal property the improvements thereon, taxes and interest, and also its capital stock.

Following the passage of these resolutions, How and Dodge gave to the defendant company deeds to the property standing in their names; the Des Moines & St. Louis Railroad Company gave the defendant company a special warranty deed not only to that portion of the terminal property standing in its name, but also to all other property, including railways, embankments, buildings, improvements, franchises, etc., in which it had any interest, in the City of Des Moines,

Iowa; and the St. Louis, Des Moines & Northern Company gave to the defendant company a deed, which by its terms transferred an absolute title to that portion of the terminal property standing in its name (vol. II, pp. 446-59). No part of the terminal property stood in the name of the Des Moines Northwestern Company and no deed was given by that company to the defendant, but each of the three railway companies or their successors received the consideration provided for in the resolutions.

On May 1, 1888, the defendant railway company took possession of the terminal property and has ever since possessed and operated it.

Immediately upon the defendant's taking possession of the terminal property, it commenced to furnish terminal service to the three railroad companies or their successors, and negotiations were entered into to determine the terms on which such terminal service should be rendered. These negotiations resulted in the contract of May 10, 1889 (vol. II, p. 479). This contract provided that for a certain consideration the defendant company should furnish to the three railway companies terminal facilities and perform certain terminal services for a period of thirty years from and after May 1, 1888. Ever since the execution of this contract the defendant has furnished to the three railroads and their successors, terminal facilities and services as therein provided.

On April 8, 1890, for the purpose of making the title and ownership of the terminal property by the defendant company more clear and certain, a meeting of the stockholders (among whom were complainants' predecessors) was held, at which the articles of incorpora-

tion of the defendant company were amended and certain resolutions passed (vol. II, pp. 488-97).

During the whole period from May 1, 1888 (the date the defendant took possession of the property), to the commencement of this suit (in 1907), the defendant treated the terminal property as its own. It acquired additional property, made improvements and extensions, made contracts to furnish service to other companies, and made other contracts with complainant companies and their predecessors. Not only during this period did defendant company treat the property as its own, but it was so treated by complainants and their predecessors and all others who had any relation to the properties. The facts in the record sustaining this are so voluminous that it is impracticable to make specific reference to them here, but such reference will be made in our argument on the facts.

### **THE ISSUANCE AND OWNERSHIP OF THE STOCK IN THE DEFENDANT COMPANY.**

Under the contract of January 8, 1882, the ownership of the then terminal property was as follows:

One-half in the Des Moines & St. Louis Company.

One-fourth in the Des Moines Northwestern Company.

One-fourth in the St. Louis, Des Moines & Northern Company.

This contract also contemplated that the parties advancing money to acquire and construct the terminal should receive first mortgage bonds for the money so advanced. The resolutions of the three railways passed January 1, 1885, authorizing a transfer of the



ownership of the terminal property to the defendant company, provided:

“That the proper officers of this Company be authorized upon the issuance to it of the share of the bonds and stock of said Des Moines Union Railway Company to which it may be entitled, under said contract, to convey, assign and transfer,” etc. (Vol. II, p. 424).

Under these resolutions, presumably the bonds would go to the persons or companies advancing the money (which were the Wabash Company and General Dodge), and the stock distributed between the three railway companies parties to the contract of January 2, 1882, in the proportion heretofore mentioned, viz. ownership of the terminal property.

In the resolutions of November 5, 1887, authorizing a transfer to the defendant company by How and Dodge, trustees, it was provided that the transfer should be made upon the defendant company agreeing to give to the purchasing committee of the Wabash Company first mortgage bonds equal in amount to the money advanced by the Wabash Company in purchasing and improving the terminal property, paying taxes thereon with interest, together with three-fourths of the capital stock of the defendant company, and upon giving to General Dodge bonds equal in amount to the money advanced by him for the same purpose, with interest, and one-fourth of the capital stock of the defendant company.

The reason for authorizing the issuance of three-fourths of the stock to the Purchasing Committee and one-fourth of the stock to General Dodge was that the Purchasing Committee was in equity entitled to the

stock coming to the Des Moines & St. Louis Company as well as to the Des Moines Northwestern Company, while General Dodge represented the St. Louis, Des Moines & Northern Company.

After the transfer of the property to the defendant company, but before possession was taken, the amount of bonds to be issued for the property was ascertained and the issuance thereof was authorized and directed by the defendant company (vol. II, p. 478). No certificates of shares of stock were actually issued until April 8, 1890.

In the meantime, however, the firm of Polk & Hubbell, of Des Moines, had acquired through contracts with the Purchasing Committee the line of road formerly owned by the Des Moines Northwestern Company extending from Des Moines, through Panora, to Fonda, and a one-fourth interest in the terminal property in Des Moines; or in lieu of such one-fourth interest, one-fourth of the stock and bonds issued by the defendant company in payment for the terminal property (Exhibits 263, 264, 265, vol. IV, pp. 1573-6; ex. 60, vol. II, p. 613). This property Polk & Hubbell transferred to the Des Moines & Northwestern Railway Company on May 19, 1888 (vol. II, p. 619). From this time up to about April, 1890, the stock of the defendant company, though not issued, was owned as follows:

One-half by the Purchasing Committee, as representative of the Des Moines & St. Louis Company;

One-fourth by the St. Louis, Des Moines & Northern Company;

One-fourth by the Des Moines & Northwestern Company.

On April 8, 1890, a resolution passed at the meeting of the stockholders of the defendant company authorized the issuance of \$400,000.00 of the capital stock of the defendant company in final payment for the terminal property, the same to be issued to the corporations and in the proportions above named (vol. II, pp. 494-6).

Just prior to this time the defendant F. M. Hubbell, and General Dodge, each bought of the Purchasing Committee certain bonds of the defendant company, and one-eighth of its capital stock (vol. IV, pp. 1599-1601). This sale was ratified by the directors of the Des Moines & St. Louis Company (vol. IV, p. 1434). The stock, therefore, when issued on April 8, 1890, was issued one share to each of the directors of the defendant company, and

To the Purchasing Committee.....	996 shares,
To the Des Moines & Northern Railway Company (successor to the St. Louis, Des Moines & Northern Railway Company) .....	998 shares,
To the Des Moines & Northwestern Railway Company (successor to the Des Moines Northwestern Railway Company) .....	998 shares,
To F. M. Hubbell.....	500 shares,
To G. M. Dodge.....	500 shares.

(Vol. II, p. 711.)

Again, on June 5, 1890, F. M. Hubbell bought of the Purchasing Committee an additional 500 shares of stock in the defendant company (vol. IV, p. 1613), which shares were transferred on the books of the defendant company August 28, 1890 (vol. II, p. 711); the

transfer being ratified by action of the Des Moines & St. Louis Company on February 11, 1891 (vol. IV, pp. 1437-8).

On January 15, 1892, the shares of the Des Moines & Northwestern Company, the Des Moines & Northern Company, F. M. Hubbell and G. M. Dodge, amounting altogether to 3,500 shares (less the shares necessary to qualify directors), were transferred to the Des Moines, Northern & Western Railway Company, a consolidation of the Des Moines & Northern Company and the Des Moines & Northwestern Company (vol. II, p. 711).

On October 4, 1893, the Des Moines, Northern & Western Railway Company pledged 2,500 shares of this stock to F. M. Hubbell & Son, as collateral security on certain indebtedness (vol. IV, p. 1480). On January 29, 1894, the Des Moines, Northern & Western Railway Company sold these same shares to F. M. Hubbell & Son in satisfaction of certain indebtedness (vol. IV, pp. 1482-3). These 2,500 shares of stock were transferred on the books of the Des Moines Union Company to F. M. Hubbell & Son October 4, 1893, and have ever since stood in their name (vol. II, p. 711). The capital stock of the defendant company is now owned as follows:

Wabash Railway Company (the remote successor of the Des Moines & St. Louis Railroad Company) —	500 shares,
Chicago, Milwaukee & St. Paul Railway Company (remote successors of the Des Moines Northern & Western Company) —	1,000 shares,
F. M. Hubbell & Son —	2,500 shares.
<hr/>	
Making a total of —	4,000 shares.

being all the outstanding stock. A few of the shares belonging to each of the above owners stand in the name of the directors of the defendant company, who represent the owners on the Board of Directors.

On this branch of the case the complainants allege that they are the real owners of the terminal property and that defendant company simply holds the title in trust for them, or that that ownership is subject to an easement in their favor which gives them the right to use the property in perpetuity for terminal purposes, upon payment of the actual cost of operation, maintenance and taxes, thus depriving the defendant company from having any beneficial ownership in the property. The real purpose of the suit is to obtain a decree which will render the 2,500 shares of stock owned by F. M. Hubbell & Son of no value.

The amended bill of complaint (Rec., Vol. I, p. 82 et seq.) made numerous charges of gross fraud against the respondents, accusing them of manipulating, falsifying and virtually forging the records of the Des Moines Union Railway Company and other companies involved, so as to sustain their claims, but there is not an iota of evidence in the record to support any of the charges, no evidence was offered with a view to support them and the records in question were received in evidence without objection and indeed were brought into the case by stipulation of the parties.

The amended bill of complaint also charges (Rec. Vol. I, p. 111) that the Hubbells, father and son, and their three other associates, at a meeting of the Directors of the Des Moines Union Railway Company held on March 12th, 1906, "voted to allow additional salaries as follows, namely: To the defendant Frederick C. Hubbell as President of the company, for the

years 1901, 1902, 1903, 1904 and 1905, \$37,500, and to the defendant Frederick M. Hubbell, as Secretary of the company for the same years, the sum of \$12,500."

The proceedings of the meeting mentioned are shown in the Record, Vol. II, pp. 333 to 336, and there is not a word of salary as to either father or son. On the other hand the evidence is undisputed that from the time the terminal company began operations down to the time of the trial, the father gave much of his time and care—and the son made it practically his exclusive occupation—to the conduct of the terminal's affairs and business. And this without a dollar of direct pay. It was done not altogether as a matter of public spirit; they had a large interest in the terminal company and hoped to profit by its welfare and prosperity. And so they labored unceasingly for its development and expansion. And the petitioners accepted these gratuitous services, well knowing that they were being rendered and why they were rendered.

The claim of the respondents is that a good and perfect title to the terminal property passed to the Des Moines Union Railway Company, and that petitioners are estopped from questioning such title by their conduct and laches.

To go into a detailed statement of facts at this point supporting these defenses would serve no useful purpose and would result in unnecessary repetition.

The decree of the Court of Appeals adjudged that the defendant company had a good and perfect title to the terminal property, and that complainants have no interest therein except that which is represented by the stock of the defendant company which they own. It is this portion of the decree which complainants bring up for review by their writ of certiorari.

## POINTS AND AUTHORITIES.

### I.

THE DEFENDANT, THE DES MOINES UNION RAILWAY COMPANY, ACQUIRED AND POSSESSES A PERFECT TITLE IN FEE SIMPLE TO THE TERMINAL PROPERTY.

The great object in the construction of all instruments is to ascertain the intention of the parties.

*Mauran v. Bullus*, 16 Pet. 527.

*Calderon v. Atlas Steamship Co.*, 170 U. S., 280.

*Insurance Co. v. Trefz*, 104 U. S. 203.

*United States v. Bethlehem Steel Co.*, 205 U. S. 119.

*Lowber v. Bangs*, 2 Wall, 736.

*Van Ness v. City of Washington*, 4 Pet. 232.

*Potomac Steamboat Co. v. Upper Potomac Co.*, 109 U. S. 681.

### II.

THE ARTICLES OF INCORPORATION OF THE DES MOINES UNION RAILWAY COMPANY AND AMENDMENTS THERETO ARE VALID.

Upon the organization of the Des Moines Union Railway Company those who by contract were entitled to shares of stock were actually stockholders, though no certificates evidencing such shares were issued. As between shareholders and the corporation, the issuance of certificates of stock is not necessary.

*Thompson on Corporations*, 2d ed., vol. 4, §§ 3455, 3507.

*First Nat. Bank v. Gifford*, 47 Iowa 583.

*Morrow v. Gould*, 145 Iowa 4.

*Hawley v. Upton*, 102 U. S. 316.

*Penderey v. Carleton*, 87 Fed. 41.

The amendments to the articles of incorporation adopted April 8, 1890 (V. II, 488-94), were valid and are binding upon the stockholders, because:

(a) It is a presumption of law that proper and valid notice of a corporate meeting has been duly given to each stockholder, and the meeting itself regularly and lawfully called.

*Cook on Corporations*, 6th ed., vol. 2, § 600.

*Chase v. Tuttle*, 12 Atl. (Conn.) 874.

*Hill v. Ry. Co.*, 55 S. E. (N. C.) 854.

*Porter v. Robinson*, 30 Hun. 209.

*Pitts v. Temple*, 2 Mass. 538.

*Benbow v. Cook*, 20 S. E. (N. C.) 453.

*Hardin & Sons v. Iowa Ry. & Const. Co.*, 78 Iowa 726.

*Moore v. Church*, 117 Iowa 33.

(b) The presumption is that the minutes of a stockholders' meeting or of a meeting of a Board of Directors are correctly and properly entered of record, and while it is allowable to contradict the records of a corporation or show that the records do not fully disclose all the proceedings, the rule is that the proof in such cases must be so convincing and satisfactory as to leave no doubt that the matter attempted to be interpolated into the record did actually occur.

*Thompson on Corporations*, 2d ed., vol. 2, §§ 1845-6.



*Hawkshaw v. Supreme Lodge*, 29 Fed. (C. C.), 770.

*Thompson on Corporations*, 2d ed., vol. 2, §§ 1850-1.

*Cook on Corporations*, 6th ed., vol. 2, §§ 600, 605, 610.

*In the Matter of the Election of St. Lawrence Steamboat Co.*, 44 N. J. L. 534.

*Dennis v. Joslin Mfg. Co.*, 36 Atl. (R. I.) 129.

*Durbrow v. Hackensack M. Co.*, 71 Atl. 59.

*Heintzelman v. Druids' Relief Assn.*, 36 N. W. (Minn.) 100.

*Sanborn v. School District*, 12 Minn. 1.

*McDaniels v. Flower*, 22 Vt. 274.

*Lane v. Brainerd*, 30 Conn. 565.

(c) The adoption of the amendments and the resolutions were acts of the stockholders (acts of complainants' predecessors as distinguished from the acts of the defendant corporation). The articles of incorporation constituted a contract between the stockholders, the terms of which they had the right to change in the manner therein pointed out, without the consent of the corporate entity.

*Thompson on Corporations*, 2d. ed., vol. 1, §§ 172, 312.

*Jones v. Electric Co.*, 144 Fed. 765 (C. C. A.).

*Hald v. Owen*, 79 Iowa 25.

*Traer v. Prospecting Co.*, 124 Iowa 112.

(d) The amendments to the articles were properly signed, acknowledged and recorded, and notice thereof was given as required by the Iowa statute.

The statute law in force on April 8, 1890, was as follows:

“That any of the provisions of the Articles of Incorporation may be changed at any annual meeting of the stockholders or special meeting called for that purpose; but said changes shall not be valid unless recorded and published as the original articles are required to be; and said changes in the Articles need only be signed and acknowledged by the officers of said Corporation.” (Ch. 88, Acts 22d G. A. [1888].)

“Previous to commencing any business, except that of their own organization, they must adopt articles of incorporation, which must be signed and acknowledged by the incorporators, and recorded in the office of the Recorder of Deeds of the county where the principal place of business is to be, in a book kept therefor; the Recorder must record such articles as aforesaid, within five days after the same are filed in his office, and certify thereon the time when the same was filed in his office, and the book and page where the record thereof will be found. The said articles and certificate of Recorder shall be then recorded in the office of Secretary of State, in a book kept for that purpose.” (Ch. 23, Laws, 17th G. A. [1878].)

“A notice must be published for four weeks in succession in some newspaper as convenient as practicable to the principal place of business, which must contain: \* \* \*” (Sec. 1613, Code of Iowa, 1897, in force on April 8, 1890.)

The purpose of these statutory provisions is to give to the world (which includes the stockholders), notice of the articles of incorporation and amendments thereto.

*Dempster Mfg. Co. v. Downs*, 126 Iowa 80.

It is a presumption of law that all stockholders assent to any change in the articles of incorporation.

*Holmes v. Royal Loan Assn.*, 107 S. W. (Mo.) 1005.

*Cook on Corporations*, 6th ed., vol. 2, § 503.

A dissenting stockholder must act promptly.

*Cook on Corporations*, 6th ed., vol. 2, § 503.

*Rabe v. Dunlap*, 25 Atl. (N. J.) 959.

*Synnott v. Cumberland Bldg. Loan Assn.*, 117 Fed. 379 (C. C. A.).

*Big Creek Gap Coal & Iron Co. v. American L. & T. Co.*, 127 Fed. 625 (C. C. A.).

*Thompson v. Lambert*, 44 Iowa 239.

*Foster v. Mansfield, etc.*, 146 U. S. 88.

The complainants cannot raise the question of the validity of these amendments, because they acquired their stock and all interest in the property subsequent to the adoption of such amendments.

*Equity Rule No. 94.*

### III.

THE COMPLAINANTS ARE ESTOPPED FROM ASSERTING THAT THE TITLE TO THE TERMINAL PROPERTY IS NOT VESTED ABSOLUTELY IN THE DES MOINES UNION RAILWAY COMPANY, AND FROM CLAIMING THAT THE STOCK OF THE COMPANY HELD BY THE DEFENDANT, F. M. HUBBELL & SON, DOES NOT REPRESENT A VALUABLE INTEREST IN SUCH PROPERTY, BECAUSE ALL THE PARTIES HAVE ACTED UPON THAT THEORY SINCE 1888

(ALMOST TWENTY YEARS PRIOR TO THE COMMENCEMENT OF THIS SUIT), AND BECAUSE, RELYING UPON THE DEEDS, CONTRACTS, RESOLUTIONS, AND ACTS BY WHICH THE COMPLAINANTS' PREDECESSORS TRANSFERRED THE PROPERTY TO DEFENDANT, AND THE ACTS OF THE COMPLAINANTS IN RESPECT THERETO, THE HUBBELLS PURCHASED OF COMPLAINANTS' PREDECESSORS STOCK IN THE DEFENDANT COMPANY FOR A VALUABLE CONSIDERATION, AND DEVOTED MANY YEARS OF THEIR LIVES TO THE CONSERVATION AND BUILDING UP OF THE PROPERTY, WITHOUT OTHER COMPENSATION THAN THAT WHICH THEY WILL SECURE BY REASON OF THE INCREASE IN THE VALUE OF THEIR STOCK.

The doctrine of estoppel always applies where one relying upon the acts and representations, either active or passive, of another, changes his position in respect to the subject matter.

*Encyc. U. S. Supreme Court Rep.*, Vol. 5, p. 939.

*Morgan v. Railway Co.*, 96 U. S. 716.

*Kirk v. Hamilton*, 102 U. S. 68.

*Linton v. Nat. Life Ins. Co.*, 104 Fed. 584.

*Given v. Times Printing Co.*, 114 Fed. 92.

*Wright v. Lieth*, 146 Iowa 290.

*Scherg v. Bank*, 141 Iowa 99.

*Anderson v. Buchanan*, 139 Iowa 676.

*Morgan v. Des Moines Union Ry. Co.*, 113 Ia.  
561.

IV.

**THE COMPLAINANTS ARE ESTOPPED FROM  
MAINTAINING THIS SUIT BECAUSE OF THEIR  
LACHES.**

For nearly twenty years prior to the bringing of this suit complainants and their predecessors knew all the facts; knew that the Des Moines Union Railway Company claimed to be the absolute owner of this property, and for seventeen years prior to the bringing of the suit knew that the Hubbells were acting in the belief that the stock owned by them represented a valuable interest in the terminal property.

Under ordinary circumstances a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous limitation at law.

*Wyman v. Bowman*, 127 Fed. 257 (C. C. A.).

*Williams v. Neely*, 134 Fed. 1 (C. C. A.).

*Railway Co. v. Stevenson*, 135 Fed. 553 (C. C.).

Section 3447 of the code of Iowa, 1897, provides:

“Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

• • • • •

“• • • Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years.”

Pomeroy, Eq. Jur. Vol. 5, Sec. 23 says:

"No doctrine is so wholesome when wisely administered as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many."

*Gallier v. Cadwell*, 145 U. S. 368.

The title and ownership of property is to be determined by the law in force in the state in which the property is located.

*Kerr v. Moon*, 9 Wheat 565.

*McCormick v. Sullivan*, 10 Wheat. 192.

Section 2918 of the code of Iowa, 1897, provides:

"Declarations or creations of trusts or powers in relation to real estate must be executed in the same manner as deeds of conveyance; but this provision does not apply to trusts resulting from the operation or construction of law."

The statute of limitations commences to run as to resulting trusts at the time of the creation of the trust.

*Boone v. Chiles*, 10 Pet. 177, 222.

*Speidel v. Henrici*, 120 U. S. 377, 386.

If there was ever an express trust in this case, it was expressly repudiated at the time of the amendments to the articles of incorporation of the Des Moines Union Railway Company on April 8, 1890, and the passage of the resolutions at that meeting.

Suits to establish implied trusts fall within the class of cases in which federal equity courts will follow the courts of law in applying the statute of limitations.

*Beaubien v. Beaubien*, 23 How. 190, 207.

*Speidel v. Henrici*, 120 U. S. 377, 386.

*Riddle v. Whitehill*, 135 U. S. 621.

*Abraham v. Ordway*, 158 U. S. 416, 420.

*Penn. M. L. I. Co. v. Austin*, 168 U. S. 685, 696.

*Baker v. Cummings*, 169 U. S. 189, 206.

## V.

THE SALE AND TRANSFER OF THE TERMINAL PROPERTY TO THE TERMINAL COMPANY WERE NOT VOID AS AGAINST PUBLIC POLICY.

The organization of terminal companies and terminal systems is a natural and logical development in centers of population and is recognized as good public policy by the courts.

*Morgan v. Des Moines Union*, 113 Ia. 561.

*United States v. Terminal R. R. Assn. of St. Louis*, 224 U. S. 401.

*Attorney General v. Terminal R. R. Assn.*, 182 Mo. 284.

*People ex rel. v. Cheesman*, 7 Colo. 376.

*State ex rel. v. Martin*, 51 Kans. 462.

*Mayor v. Norwich R. R. Co.*, 109 Mass. 103.

*Union Depot Co. v. Morton*, 83 Mich. 265.

*Secs. 2099, 2130, Code of Iowa, 1897.*

But, assuming that the original transaction was *ultra vires* as against public policy, the transaction was a completed one nearly twenty years prior to the commencement of this suit, and the courts will not now disturb it.

*St. Louis, Etc., R. R. Co. v. Terre Haute, Etc.,  
R. R. Co.*, 145 U. S. 393.



## ARGUMENT.

### I.

THE DEFENDANT, THE DES MOINES UNION RAILWAY COMPANY, ACQUIRED AND POSSESSES A PERFECT TITLE IN FEE SIMPLE TO THE TERMINAL PROPERTY.

The solution of this question does not, we think, involve any difficult or seriously disputed questions of law, but simply an examination of the origin and evolution of the terminal property. In its consideration it is well to start at the beginning and consider the origin and growth of the property, step by step, to determine the objects and intentions of the various corporations and persons who had to do with the transaction.

The first item for consideration is the contract of December 8, 1880, between the Wabash, St. Louis & Pacific Railway Company and J. S. Polk and others, which provided for the organization of the Des Moines & St. Louis Railroad Company (the remote predecessor and grantor of the Wabash Railway Company), and the construction by that company of a line from Albia to Des Moines with funds to be furnished by the Wabash, St. Louis & Pacific Railway Company, which line when constructed was to be leased in perpetuity to the last named company (Vol. II, p. 396).

This contract is of no great importance except that it furnishes a starting point for the consideration of this case and the origin of the scheme out of which the terminal proposition grew. The line from Albia to Des Moines was constructed as contemplated in the contract, and leased to the Wabash Company.

On the same date the Wabash, St. Louis & Pacific Railway Company entered into a written contract with the Des Moines Northwestern Railway Company and the Narrow Gauge Construction Company (Vol. II, p. 400), which recites the fact that the Des Moines Company owned a railroad from Waukee, a point on the Des Moines & Fort Dodge Railroad about fifteen miles west of Des Moines, to Panora; recites the making of the contract between the Wabash Company and J. S. Polk and others heretofore referred to, contemplating the construction and lease of the railroad of the Des Moines & St. Louis Company, and the desire of the Wabash Company to obtain the business originating on the road of the Des Moines Company, and provides for the extension of the road of the Des Moines Company in a northwesterly direction and also to Des Moines, and among the provisions are the following (p. 406):

“It is further mutually agreed by and between the parties above named, that if certain pending negotiations between the Wabash Company and the Des Moines & Fort Dodge Company shall result in the Wabash Company’s acquiring control, by lease or otherwise, of the Des Moines and Fort Dodge Road, then the Des Moines Company shall have the right (upon terms to be fixed by agreement of the parties, otherwise to be settled under the general provisions herein made for arbitration) to extend its line into Des Moines by laying a third rail upon the Des Moines & Fort Dodge Road.

It is further mutually agreed by and between the parties above named, that if the pending negotiations between the Wabash Company and the Des Moines & Fort Dodge Company shall fail, then the railroad of the Des Moines Company shall be

extended to a connection with the railroad of the Des Moines & St. Louis Company, at or near Des Moines, substantially under the provisions of the foregoing agreement, but with such modifications as the greater cost of such extension may require. The Des Moines Company shall in that case have full right of entry into Des Moines, by laying a third rail on the Des Moines & St. Louis Road, and full use of the terminal facilities of that road, upon terms to be settled by agreement between the Des Moines Company and the Wabash Company, or else under the arbitration elsewhere provided for herein.

It is further agreed on the part of the Wabash Company that if it shall acquire control of the Des Moines & Fort Dodge Road, then the Wabash Company will permit the Des Moines Company to lay down a third rail on the track of the Des Moines & St. Louis Road, from the terminus of the Fort Dodge Road, in the City of Des Moines, eastwardly far enough to reach such pork houses and other sources of freight as are on the east side of the City of Des Moines, and are reached by the tracks of the Des Moines & St. Louis Road."

On page 989 of volume III appears an entry on the books of the Wabash Company made in April, 1881, as follows:

"For the following payments for n/e of real estate in the City of Des Moines, Iowa, charged to Des Moines & St. Louis R. R. in the months of Feb'y, March and April, 1881, now transferred to real estate Des Moines, the property being held for joint account of the Des Moines & St. Louis and Des Moines & North Western Rys., as per letter of James S. Clarkson, Pl. filed herewith:"

And then follow various items of expenditure which had theretofore been made for a terminal property in the City of Des Moines and charged to the Des Moines & St. Louis Railroad Company.

The foregoing contracts and this entry show that it was originally contemplated that the terminal property in the City of Des Moines should be owned by the Des Moines & St. Louis Railroad Company and not by a terminal company and not jointly by that road and the Des Moines Northwestern Railway Company.

The entry on the books of the Wabash above referred to shows that this plan as originally contemplated was changed in April, 1881, to a plan which contemplated that the terminal property should be owned jointly by the Des Moines & St. Louis and the Des Moines Northwestern companies, because at that time the charge upon the Wabash books was changed from a charge against the Des Moines & St. Louis to a charge against Real Estate Des Moines, to be held for the joint account of the two companies named.

In April, 1881, there were adopted under the laws of the State of Iowa articles of incorporation of the St. Louis, Des Moines & Northern Railway Company (Vol. II, p. 729), for the purpose of constructing a line of railway from the City of Des Moines through Boone, Iowa, toward the north line of the state.

This company proceeded toward the construction of this line of road, and also a branch from Clive, a station about five miles west of Des Moines, to Waukee, and on January 23, 1882, it made a contract with the Des Moines Northwestern Railway Company by which it sold to the latter company the branch from Clive to Waukee, and a one-half interest in the line from Waukee to Farnham street in Des Moines (the western

limit of the terminal property), giving the Des Moines Northwestern entrance into the City of Des Moines.

This shows that the plan of the Wabash Company to acquire a control of the Des Moines & Fort Dodge line failed, and the entrance of the Des Moines Northwestern Company into Des Moines was secured through this contract with the St. Louis, Des Moines & Northern Railway Company.

On January 2, 1882, a contract was entered into between the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, G. M. Dodge, James F. How and James F. How, trustee (Vol. II, p. 411), which shows that another change was made in the plan for a terminal in the City of Des Moines and by which it was contemplated that the terminal property should be owned and operated jointly by the three railway companies—the Des Moines & St. Louis Railroad Company, the St. Louis, Des Moines & Northern Railway Company, and the Des Moines Northwestern Railway Company.

This contract recited the fact that the three companies desired to own and operate jointly terminal facilities in the City of Des Moines and use the same in common; that certain purchases had been made of real property in the said city in the name of James F. How, individually, and James F. How, trustee, and Grenville M. Dodge, and certain additional property had been appropriated by the Des Moines & St. Louis Railroad Company, and the construction of buildings and other improvements thereon had begun. It was agreed that the expense thereof should be borne one-half by the Des Moines & St. Louis Company and one-fourth each by the other companies, and that a depot

company might be organized to take permanent charge of the property upon the terms set forth in the contract. It specifically provided that the title to said property should be and remain in a trustee to be named by agreement of the said companies, and subject to the joint use and occupation of all the railway companies upon the terms therein contained; that the Des Moines & St. Louis Company should be charged with the police control and supervision and maintenance of the property, and that the expense thereof should be apportioned among the companies upon a whorage basis. Other provisions were made in the contract not necessary to be here mentioned.

It will be seen from the foregoing that up to this time three different schemes had been adopted for this terminal property:

First. that it should be owned exclusively by the Des Moines & St. Louis Railroad Company.

Second. That it should be owned jointly by the Des Moines & St. Louis and the Des Moines Northwestern Railway Company.

Third. That it should be owned jointly by the three companies parties to the contract last above mentioned.

A short time prior to this date, on December 1, 1881, the Des Moines & St. Louis Railroad Company mortgaged its property to the Central Trust Company of New York (Vol. II, p. 509). This mortgage specifically excepted the terminal property in the City of Des Moines, the exception being in the following language (p. 511):

“except the real estate, buildings and improvements thereon lying and being within the corporate limits of the City of Des Moines.”

thus showing that the terminal property was to be handled as a proposition separate from the main line of the Des Moines & St. Louis Road.

Counsel for petitioners devote much time and space to a discussion and an analysis of this contract and the rights of the railway companies thereunder. To our mind the rights acquired by the railway companies by this contract are simple and easily stated. By its terms the three railway companies became the beneficial owners of the property.

Here it is proper to note that the ownership of the three railway companies was not equal, but one-half by one and one-fourth by each of the others. The usual and ordinary rights and incidents of ownership were recognized by the parties. They contemplated use of the property by other railway companies, for which those other companies were to pay. And what was to be done with the money received from such sources? Was it to go to the three in equal measure? By no means. It was distributed among them in the ratio of ownership. Section 10 of the contract of January 2nd, 1882 expressly provides “the rental to enure to the companies hereto in the same proportion as the original outlay.” Vol. II, p. 413.

Each Company owned an undivided interest in the property, with the right to use the whole property for railway purposes. Whether, as between the three railway companies, we term the right of one company to use the whole property for railway purposes an easement, or what not, is entirely immaterial. Considering the three railways together, they not only owned

the property, but had the right to direct the trustees, How and Dodge to transfer the legal title to them or to any one whom they might select. As a result, they had absolute dominion over the property, with the right to continue to use it in accordance with the strict terms of the contract, or to make any other disposition of it to which the three railway companies could agree. They might by agreement have placed the legal title in a trustee, reserving to themselves the beneficial ownership; they might have transferred the property to a third person, reserving in themselves an easement; or they might have made any other disposition of it upon which they could agree. In other words, their power of disposition of this property was unlimited because they were its owners. The question we have for solution is what disposition they in fact did make of it, and for this purpose we must examine their subsequent acts and from them and the surrounding circumstances ascertain the true intent of their acts.

In this connection, however, it must be noted that looking forward to possible changes in their terminal plans, as the future might develop the necessity therefor, the parties had carefully segregated the terminal property from their main lines, as see the provision in the Des Moines & St. Louis mortgage above noted, eliminating the terminal property therefrom, the deed and contract above noted between the St. Louis, Des Moines & Northern Company and the Des Moines Northwestern Company, which limited the transfer to property west of the terminal, and to the mortgage given by the St. Louis, Des Moines & Northern to the Mercantile Trust Company (Vol. II, p. 552), which only covered property extending "from the western



boundary line of the City of Des Moines," etc. (p. 554).

The significance of these changes in the plan for the terminal property, and its careful segregation from the main lines, lies in the fact that they indicate that the terminal plan was in a formative stage, and the parties wished to so manage it that any desired change might be made in the future. It is for us to determine if such changes were made.

Subsequent to the making of this contract of January 2, 1882, additional property was acquired, improvements made thereon, and the property for some years was used jointly by the St. Louis, Des Moines & Northern Railway Company and by the Wabash Company, lessee of the other two companies.

Among the things which were contemplated by these railway companies with respect to this terminal property, as shown by these contracts already referred to, was that other companies should be induced to use it to the end that the expense of operating it might be lessened. The impracticability of thus operating the terminal property and having two or more railway companies operating over it indiscriminately is apparent upon reflection, and it is apparent that its impracticability became impressed upon the persons engaged in operating it, for we find that in 1884 steps were taken to change the method of operation and to provide for its operation by a terminal company, and in this step we have the first evidence of a change of the plan as outlined in the contract of January 2, 1882.

At this point we are aided by a concession made by counsel for the Chicago, Milwaukee & St. Paul Railway Company on page 13 of their argument in the Court of Appeals, as follows:

"It needs no railroad man to know that such use in common by three different companies, without any central head or management, would lead to confusion and to danger. It was quite natural, in fact necessary, that the control and management and in fact the operation of this property should be put in charge of some one individual, or some natural or artificial person."

In ascertaining the changes that were made in the terminal plans as outlined in the contract of January 2, 1882, we may therefore start with the concession that those plans had proved impracticable and the necessity for a change had become apparent.

At the instance of the three railway companies parties to the contract of 1882 a meeting of the incorporators of the defendant, the Des Moines Union Railway Company, was held in Des Moines, Iowa, at which were adopted the original articles of incorporation of the defendant company (Vol. II, pp. 416-23). The articles adopted set out by reciting the fact of the execution of the contract of January 2, 1882, and incorporate the contract as a preamble to the articles.

Counsel for petitioners have attempted to make much of the recitations contained in these articles of incorporation and in the minutes of the meeting at which they were adopted, but an examination of them will, we think, demonstrate that they support our view of this case. The first recitation is as follows (p. 416):

"At a meeting held in Des Moines, Iowa, on the 10th day of December, 1884, for the purpose of organizing a Union Depot & Railroad Company to be run and operated in and around the City of Des Moines, Iowa, in pursuance of a contract heretofore, to wit: on the 2nd day of January, A. D. 1882, entered into \* \* \*."

It will be noted that the purpose of this meeting is stated to be the organization of a "*Union Depot & Railroad Company to be run and operated in, around and about the City of Des Moines, Iowa.*" The contract of January 2, 1882, did not by its terms provide for a railroad company which should operate a railroad in and around the City of Des Moines, but only for a depot company which would simply have permanent charge of the property, without the power of ownership or operation. This demonstrates a change in the plans of the parties.

After setting out the contract the articles provide:

"Whereas each of said railway companies and said parties has expended large sums of money in purchasing and improving the property aforesaid, and in the construction of suitable buildings for the use of said company, and " (p. 419).

This recitation did not accurately state the facts. As a matter of fact, neither one of the three railway companies had contributed a dollar directly toward the purchase or construction of this terminal property. The money used for its purchase and construction had all been furnished by the Wabash Company and by General Dodge. No one else had put a dollar into it. The only way in which the three railway companies, parties to the contract of January 2, 1882, put any money into it was that the Wabash Company had charged the money advanced to these three companies.

The articles then recite:

"Whereas it was provided in the contract aforesaid that a Depot Company might be organized to

take permanent charge of the property, and it was the understanding of the parties that such company might acquire, operate and maintain said property in such manner as best to serve the interest of the parties hereto."

This recitation shows one of two things: either that the contract of 1882 did not correctly state the understanding of the parties, or that the plan for the terminal had changed since the execution of that contract. It recites that "*it was the understanding of the parties that such company might acquire, operate and maintain said property.*" No such understanding can be found in the language of the contract. The contract provides that the property should be acquired by the three railway companies, though the title might be taken in the name of a trustee; that it should be operated by them jointly, and that it should be maintained by the Des Moines & St. Louis Railroad Company, while this recitation evidenced the fact that it was the understanding that the property should be acquired, operated and maintained all by a separate company.

The articles then continue (p. 420):

"Now, therefore, for the purposes aforesaid, as well as for those hereinafter expressed, the undersigned hereby associate themselves in a body corporate, and adopt the following:"

The object, then, of organizing the defendant company was not merely to provide a depot company referred to in the contract, but for other purposes. One of the "purposes aforesaid" was that "such company might acquire, operate and maintain said property,"

and the purposes "hereinafter expressed" must be those which are subsequently contained in the articles of incorporation.

Article 1 provides that the name of the corporation shall be the Des Moines Union Railway Company. This name is significant in fixing the intention of the parties. It wasn't a mere depot company or a company organized for the purpose of holding the legal title to the terminal property in trust, but it was a corporation organized for the purpose of performing the duties and functions of a railway terminal company.

As will appear later there is great difference under the laws of Iowa between a depot company and a railway company. The Des Moines Union is a railway and terminal company.

Article 2 provides:

"The general nature of the business to be transacted shall be the *construction, ownership and operation of a railway* in, around and about the City of Des Moines, Iowa, including the construction, ownership and use of depots, freight houses, railway shops, repair shops, stockyards and whatever else may be useful and convenient for the operation of railways at the terminal point of Des Moines, Iowa, as well as the transfer of cars from the line or depot of one railway to another, or from the various manufactories, warehouses, storehouses, or elevators to each other or to any of the railways or depots thereof, now constructed or to be hereafter constructed, in or around said City of Des Moines, and such corporation shall possess all the powers conferred upon corporations for pecuniary profit by Chapter I of Title IX of the Code, and the amendments thereto."

This article provides that this railway company shall exercise the following powers and duties not contemplated by the contract of January 2, 1882:

- (1) The construction of a railway;
- (2) The ownership of a railway;
- (3) The operation of a railway;
- (4) The construction of depots, freight houses, railway shops, repair shops, stockyards, and whatever else may be useful and convenient for the operation of a railway at the terminal point in Des Moines, Iowa;
- (5) The ownership of such depots, freight houses, etc.;
- (6) The use of such depots, freight houses, etc.;
- (7) The transfer of cars from the line or depot of one railway to another;
- (8) The transfer of cars from the various manufactories, warehouses, storehouses, or elevators to each other or to any of the railways or depots now constructed or hereafter constructed in or around the City of Des Moines;
- (9) The possession of all powers conferred upon corporations for pecuniary profit by Chapter I, Title IX of the Code, and the amendments thereto.

None of these nine functions was contemplated by the contract of January 2, 1882. It is evident from these provisions that the plan of ownership and operation of the terminal property had changed since the making of that contract.

It is then provided in article 2 in part as follows (p. 420):

“ \* \* \* All the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882.”

Much time and space has been devoted to a discussion of this provision by counsel for petitioners. In its interpretation we must give force and effect to other provisions in the articles of incorporation and the acts and conduct of the parties in relation thereto. This provision is purely interpretative in its character and cannot serve to qualify any provision of the articles which is clear and express in its terms, nor can it nullify any grant of power to the Des Moines Union Company clearly made by the articles. Manifestly, it cannot be construed to nullify or modify the power of the terminal company to construct, own and operate a railway in, around or about the City of Des Moines, because these powers are expressly granted. Manifestly, also, it cannot mean that the terminal property is to be owned or operated according to the terms of the contract of January 2, 1882, because that contract provides for the ownership by the three railway companies; provides for its operation by the three railroad companies jointly, and provides for police control, supervision and maintenance by the Des Moines & St. Louis Railroad Company.

From the beginning these parties had in mind the construction of terminal facilities in the City of Des Moines separate from their main systems, as well in ownership as in operation, which might be used by all of them as well as others in connection with the oper-

ation of their roads. This primary object was never departed from. The departures which were made were with respect to the method by which this primary object should be attained.

Article 3 provides:

*"The capital stock of this corporation shall be one million (\$1,000,000.00) dollars, which shall be divided into shares of one hundred (\$100.00) dollars each, and shall be paid in at such times and in such manner as the board of directors may determine, and the board are authorized to receive in payment therefor the property and franchises in the City of Des Moines, now held by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, trustee, Jas. F. How and Greenville M. Dodge."*

This article clearly contemplates two things not contemplated by the contract of January 2, 1882:

First. That the stock should be paid for when issued.

Second. That it might be paid for by a transfer of the terminal property and franchises.

It needs no argument to show that these purposes were not contemplated by that contract, and that it evidences a change in the plan.

Under the contract of January 2, 1882, the three railway companies owned this terminal property, although it was contemplated that the title thereto might stand in the name of the trustee. As such beneficial owners, and under that contract, they had power to control it because they owned it and because of the terms of the contract.



Counsel for the Wabash Company, speaking of what was intended to be represented by this stock, on page 309 of his Coprt of Appeals brief, frankly says:

"\* \* \* I think it axiomatic that a corporation takes absolutely that which is transferred to it in exchange for its shares of stock, and, accordingly, that the Depot Company does not hold the servient estate in trust, but absolutely."

The question here is, what was intended, by the article above quoted, should be received by the terminal company in exchange for "its shares of stock."

The article says, first, that it shall receive "the property and franchises in the City of Des Moines now held by the Des Moines & St. Louis Railroad Company."

Under the contract of January 2, 1882, the Des Moines & St. Louis Railroad Company owned a one-half interest in the terminal property, which included not only the real estate where absolute title had been acquired by deed, but also the easement or right of way over property acquired by condemnation proceedings or right of way deed; also the embankments, ties, rails, buildings, and other structures located upon the property and used in connection with the operation of the terminal; also the franchise or right to use the property for terminal purposes. All these were property and were the things that were contemplated should be transferred to the terminal company in exchange for its stock.

Likewise, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railroad Company owned and held each a one-fourth interest in the same property. James F. How and Grenville M. Dodge held the legal title to a por-

tion of the real estate. The whole property and every interest therein was owned and held by these three railroad companies and the trustees, and it was this property which it was contemplated should be transferred for the stock—therefore adopting the axiom stated by counsel for the Wabash; this article contemplated that the terminal company should take "absolutely" the whole terminal property "in exchange for its shares of stock."

It evidently was their desire to change the status of the property and turn it over to a separate corporation which should own and operate it, but in connection therewith they did not desire to lose their power of control and therefore it was in their opinion necessary to put something into the articles of incorporation by which a limitation should be placed upon the power of the terminal company to control the property, and in article 2 they provide:

"\* \* \* All the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882, by and between the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Jas. F. How, trustee, and Grenville M. Dodge. The said company shall have the right to lease or otherwise dispose of the use of any part of its franchises to any other railway company—provided that the assent in writing of the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company shall be necessary before any such lease or disposition can be made to any other than the parties above named."

And in article 4 it was provided:

"Four members of the board shall be nominated by the Wabash, St. Louis & Pacific Railway Company, two members by the Des Moines Northwestern Railway Company and two members by the St. Louis, Des Moines & Northern Railway Company, and no stockholders shall be eligible for membership of the board unless so nominated.

The fact that a candidate has been duly nominated shall be certified to the stockholders' meeting of this company by the secretary of one of the respective companies aforesaid and such certification shall be conclusive.

The provisions herein with respect to nomination for the board of directors shall apply to and be enjoyed by any grantee or assignee of either of the railway companies aforesaid. No contract, lease, or other agreement, amounting to a permanent charge upon the property of the corporation, shall be entered into by the board unless the same shall have been first approved by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, or their assigns, and shall have been submitted to a meeting of the stockholders, duly called, and shall have been approved by more than three-fourths of all the stockholders; and it shall not be within the power of the board of directors to create any limitation whatsoever upon any of the franchises of the corporation, except the same shall have been submitted to and approved by the stockholders as hereinbefore provided."

Now, it wasn't necessary to put these provisions into the articles of incorporation if it was not intended to give the terminal company the title and ownership of the property. If the terminal company simply was to

hold the property as trustee, it would have no power to dispose of or encumber it without the consent of the beneficial owners. So these provisions, instead of showing that it was intended that the three railway companies should retain an interest in the property, show that it was intended that the terminal company should own the property, but these provisions were put in as a limitation upon the power of the corporation to alienate its property.

Now, of course, the adoption of these articles did not change the title or ownership of the terminal, but they clearly indicate the purpose of the parties instrumental in organizing it to transfer the ownership and title, just the same as the building of a house would indicate the purpose of the builder that some one should live in it.

These articles were adopted on the 10th day of December, 1884. On the 1st day of January, 1885, there were certain resolutions passed at meetings of the stockholders of the three corporations parties to the contract of January 2, 1882. To correctly understand what was intended by these resolutions it is well to consider first the resolutions adopted by the Des Moines Northwestern Railway Company. This company did not hold the legal title to any portion of the terminal property. The only interest it had in the property was that evidenced by the contract of January 2, 1882, under the terms of which it was the beneficial owner of a one-fourth interest.

The resolutions appear commencing at page 426 of volume II, and in them it is first

“Resolved, that this company ratifies and approves the selection heretofore made of J. S. Polk and F. M. Hubbell to serve as directors of the Des Moines Union Railway Company in accordance with the provisions of article four (4) of the articles of incorporation of that company authorizing this company to nominate two members of the board of directors of said company.”

In connection with this resolution it is important, for reasons which we will hereafter state, to note that from the organization of the Des Moines Union Railway Company down to the adoption of certain amendments to the articles of that company, the three railway companies parties to the contract of January 2, 1882, exercised the power given them in article 4 of the articles of incorporation, to nominate directors of the Des Moines Union Railway Company.

The resolution then continues:

“Whereas, the Des Moines, St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, G. M. Dodge, James F. How, and James F. How, trustee, on the 2nd day of January, 1882, entered into a contract whereby it was agreed to purchase, hold, control and use certain real estate and franchises in the City of Des Moines which had theretofore been held and used by certain of the individual parties hereto for certain purposes and upon certain conditions set out in said contract, and”

The only importance of this recitation is to indicate that the subject matter of the resolutions which follow.

The resolution then continues:

“Whereas, on the 10th day of December, A. D. 1884, a corporation under the name and style of the Des Moines Union Railway Company was organized as contemplated and provided in the aforesaid contract, *to acquire, hold, use and enjoy* the real estate, property rights and franchises in the City of Des Moines east of Farnham street in said city of the aforesaid railway company and signatories of said contract acquired or held thereunder, and to carry out the purposes of the said contract of January 2nd, 1882.”

Note the use of the word “*enjoy*” in connection with the above resolution. This corporation was organized not only to acquire, hold and use the real estate, but also to *enjoy* it. We take it that the word “acquire” used in this connection means to get the title to the property; the word “hold” means to be possessed of it; the word “use” means to operate it for the purpose of carrying on a railway business, and the word “enjoy” means to derive a profit or benefit from the acquiring, holding and using of the property. The things which it was contemplated this terminal company was to “*acquire, hold, use, and enjoy*” were, *first*, the real estate; *second*, the property rights, and *third*, the franchises. These three words comprised all the interest which the three railroad companies or the trustees had in the terminal property.

The resolution then continues:

“Now, Therefore, Resolved, That this company accepts and ratifies so far as its interests are affected thereby, the Articles of Incorporation of the Des Moines Union Railway Company as in substantial accord and compliance with the terms and conditions of the said contract of January 2nd, 1882, and undertakes to discharge all the obligations imposed upon it by said contract in order to make effective the purposes of said Des Moines Union Railway Company.”

Note that this resolution accepts and ratifies the articles of incorporation of the defendant railway company, as in substantial accord and compliance with the terms of the contract. When they ratified the articles of the Des Moines Union Railway Company they ratified that portion which gave to that railway company the power to own, construct and operate a terminal property in the City of Des Moines, and the power to acquire the ownership of this particular property and pay therefor by an issuance of its stock, as well as any other portion of the articles of incorporation. And note, also, that by this resolution they undertook to make effective the purposes of the Des Moines Union Railway Company, which were to acquire the ownership, management and control of this terminal property, and to pay therefor by an issuance of its capital stock.

This resolution adopted by each of the three railway companies relative to the articles of incorporation, recites the execution of the contract of 1882, the adoption of the articles of incorporation, that it was such a corporation as contemplated in the contract, and that the corporation so contemplated was to acquire, hold,

The only importance of this recitation is to indicate that the subject matter of the resolutions which follow.

The resolution then continues:

"Whereas, on the 10th day of December, A. D. 1884, a corporation under the name and style of the Des Moines Union Railway Company was organized as contemplated and provided in the aforesaid contract, *to acquire, hold, use and enjoy* the real estate, property rights and franchises in the City of Des Moines east of Farnham street in said city of the aforesaid railway company and signatories of said contract acquired or held thereunder, and to carry out the purposes of the said contract of January 2nd, 1882."

Note the use of the word "*enjoy*" in connection with the above resolution. This corporation was organized not only to acquire, hold and use the real estate, but also to *enjoy* it. We take it that the word "acquire" used in this connection means to get the title to the property; the word "hold" means to be possessed of it; the word "use" means to operate it for the purpose of carrying on a railway business, and the word "*enjoy*" means to derive a profit or benefit from the acquiring, holding and using of the property. The things which it was contemplated this terminal company was to "*acquire, hold, use, and enjoy*" were, *first*, the real estate; *second*, the property rights, and *third*, the franchises. These three words comprised all the interest which the three railroad companies or the trustees had in the terminal property.



The resolution then continues:

"Now, Therefore, Resolved, That this company accepts and ratifies so far as its interests are affected thereby, the Articles of Incorporation of the Des Moines Union Railway Company as in substantial accord and compliance with the terms and conditions of the said contract of January 2nd, 1882, and undertakes to discharge all the obligations imposed upon it by said contract in order to make effective the purposes of said Des Moines Union Railway Company."

Note that this resolution accepts and ratifies the articles of incorporation of the defendant railway company, as in substantial accord and compliance with the terms of the contract. When they ratified the articles of the Des Moines Union Railway Company they ratified that portion which gave to that railway company the power to own, construct and operate a terminal property in the City of Des Moines, and the power to acquire the ownership of this particular property and pay therefor by an issuance of its stock, as well as any other portion of the articles of incorporation. And note, also, that by this resolution they undertook to make effective the purposes of the Des Moines Union Railway Company, which were to acquire the ownership, management and control of this terminal property, and to pay therefor by an issuance of its capital stock.

This resolution adopted by each of the three railway companies relative to the articles of incorporation, recites the execution of the contract of 1882, the adoption of the articles of incorporation, that it was such a corporation as contemplated in the contract, and that the corporation so contemplated was to acquire, hold,

use and enjoy all of the property in question; and then it is resolved that the railway company accepts and ratifies the articles of incorporation as in substantial accord and compliance with the terms and conditions of the contract of 1882, and the company "undertakes to discharge all the obligations imposed upon it by said contract, in order to make effective the *purposes of said Des Moines Union Railway Company.*"

The resolution then continues:

"Resolved, That the proper officers of this company be authorized *upon the issuance to it of the share of the bonds and stock* of said Des Moines Union Railway Company to which it may be entitled under said contract to *convey, assign and transfer* to said company all its *right, title and interest of whatever name and character in and to the real estate, franchises, choses in action, and rights in possession or contingent to all the property* in the City of Des Moines east of Farnham street in said city now held, enjoyed or claimed by either or all of the signatories of said contract of January 2, 1882, or any agent or trustee thereof purchased, acquired, or held in pursuance of said contract."

Now, what was it, the transfer of which was intended by the stockholders to be authorized by this resolution? Was it something which it had, or something which it didn't have? The Des Moines Northwestern Railway Company did not have the *legal* title to a single shovelful of dirt, a single tie, a single rail or spike, or any other portion of the terminal property. What it had, and all it had was the beneficial interest in one-fourth of the property contemplated by the contract of January 2, 1882.

If it had been intended to authorize the transfer only of the legal title to the property, there would have been no occasion whatever for the passage of this resolution. What would have been necessary for such a purpose would have been a resolution authorizing the persons who held the legal title to make the transfer. The only purpose of this resolution was to authorize the transfer of something which it had, which as we have said, was the beneficial ownership of a one-fourth interest in the property, and this is exactly what the language of the resolution authorizes. It says:

*"assign and transfer to said company all its right, title and interest of whatever name and character in and to the real estate, franchises, choses in action, and rights in possession or contingent to all the property in the City of Des Moines."*

which is covered by the contract of January 2, 1882.

What possible interest did or could the Des Moines Northwestern Railway Company have had in this property which was not authorized to be transferred by this resolution? What right, title or interest is reserved by the terms of this resolution? What more appropriate language could have been selected to express an intention to transfer the *ownership* of the property?

The resolutions speak of carrying out the purposes of the contract of January 2, 1882. That was precisely what they were doing, and doing it by transferring the terminal property to the terminal company and taking to themselves the stock of the terminal company. Through this stock ownership they could control the terminal company.

On pages 40 and 41 counsel for the Milwaukee Company in their Court of Appeals brief discuss the rights

of that company as the successor of the Des Moines Northwestern Railway Company (owner of the Fonda line), and assert that by the contract of January 2, 1882, the Des Moines Northwestern Company acquired a one-fourth interest in the terminal property, and then say:

"Now, two questions arise. Could any conveyance or any act of the St. Louis Company and the Northern Company, or either of them, cut off or destroy this right of the Northwestern Company, which they had solemnly granted to it by the contract of January 2, 1882? Or has the Northwestern Company or its successors ever done anything that would destroy or convey away this right to the use of this property?"

The answer to the first query above quoted is, of course, no. The rights of the Northwestern Company could only be cut off by its own action or that of its successors. When we come to answer the second question as to what the Northwestern Company or its successors have done to convey its interest in this property, the answer is easy.

In the Milwaukee's chain of title there appear the following owners of the property in the order named:

1. The Des Moines Northwestern Company.
2. Polk & Hubbell, who acquired the property in pursuance of a contract with the Wabash purchasing committee, and through a foreclosure of the original Des Moines Northwestern mortgage.
3. The Des Moines & Northwestern Railway Company, which acquired the property from Polk & Hubbell.

4. The Des Moines Northern & Western Railway Company, which acquired the property by the consolidation of the Boone and Fonda lines.

5. The Des Moines Northern & Western Railroad Company, which acquired the property through a foreclosure of a mortgage given by its immediate predecessor.

The act of the Des Moines Northwestern Railway Company by which a conveyance of the ownership of the property was authorized, consisted in the resolutions from which we have just quoted.

These resolutions are supplemented by the resolutions of 1887 hereafter referred to.

If the purchase price provided for in these resolutions had been paid to the Northwestern Company and the conveyance authorized by this resolution made, no question could arise.

The thing actually done was this: Polk & Hubbell made a contract with the purchasing committee of the Wabash Railroad Company, which owned the Des Moines Northwestern bonds, by which the purchasing committee agreed to sell to Polk & Hubbell the Des Moines Northwestern Road extending northwesterly from Farnham street, and a one-fourth interest in the terminal property; title to be secured by a foreclosure of the Des Moines Northwestern line mortgage. By this contract, however, the purchasing committee retained the option of delivering to Polk & Hubbell one-fourth of the stock and bonds which it might receive from the terminal company in payment for the one-fourth interest in the terminal property, in lieu of conveying such interest in the terminal property.

This mortgage was foreclosed and Polk & Hubbell acquired the title to the Des Moines Northwestern Line through the foreclosure proceedings, and received from the purchasing committee one-fourth of the stock and bonds of the terminal company in lieu of one-fourth interest in the terminal property.

Polk & Hubbell transferred to the Des Moines & Northwestern Railway Company the Des Moines Northwestern or Fonda line, commencing at Farnham street, and one-fourth of the stock and bonds of the terminal company which they had received in lieu of an interest in the terminal property.

In this way the grantee of the Des Moines Northwestern Company received the purchase price for the former's interest in the terminal property, in lieu of receiving an interest in the terminal property itself.

As heretofore noted, there appears in the Milwaukee's chain of title the decree of foreclosure of the mortgage given by the Des Moines Northern & Western Railway Company, and the deeds executed in pursuance thereof. The Milwaukee Company have no rights which were not included in this foreclosure and these deeds. The mortgage referred to covered only the railroad property extending northwesterly from Farnham street, and the only interest ever possessed by the Des Moines Northwestern Company in the terminal property at Des Moines covered by this mortgage under which the Milwaukee holds was the interest represented by the stock acquired by Polk & Hubbell pursuant to their agreement with the Wabash purchasing committee.

Very clearly every right of the Des Moines Northwestern had thus been transferred to Polk & Hubbell, and that transfer was in the form of a transfer of the

consideration which was to be paid for the interest in the terminal property. There was no occasion for any direct conveyance by any one, of the interest of the Des Moines Northwestern in the terminal property, because no interest in that company appeared of record.

After the adoption of this resolution another one was offered and adopted which reads as follows:

"Resolved, That the proper officers of the company be authorized to transfer the management and operation of its property in Des Moines, so far as the same may now be vested in the company to the Des Moines Union Railway Company on the 1st day of January, 1885, or as soon thereafter as practicable, leaving the question of settlement between this company and the Des Moines Union Railway Company as authorized under the resolution for that purpose heretofore this day adopted to be arranged as directed therein." Vol. II, p. 427.

Taking these resolutions as a whole, it will be noted that there were two subjects covered by them—first, a sale and transfer of this property to the Des Moines Union Railway Company and the payment by that company in bonds and stock, the amount of which, so far as the bonds were concerned, could only be ascertained by an accounting between the companies. This would necessarily take some time. It was desired that the management of the property should be turned over to the defendant company at once, the reason being, we assume, that the impracticality of operating it in the manner in which it had theretofore been operated was pressing upon the parties. The last resolution pro-

vided for an immediate transfer of the possession, control and operation of the property, leaving the settlement between the parties, as authorized in the prior resolution, for future adjustment. Thus, as we have said, two objects were intended:

First. The immediate surrender of the possession and operation of the property; and

Second. A transfer of the ownership thereof and a settlement of the purchase price.

The same identical resolutions were on the same day passed by the stockholders of the St. Louis, Des Moines & Northern Railway Company (Vol. IV, pp. 1473-4), and by the stockholders of the Des Moines & St. Louis Railroad Company (Vol. II, pp. 430-2).

The only difference between the situation of the Des Moines Northwestern Company and the situation of the St. Louis, Des Moines & Northern and the Des Moines & St. Louis companies was that the title to a small portion of the terminal property stood in the name of each of the latter two companies, so that they not only owned the beneficial interest in the terminal property, in accordance with the contract of January 2, 1882, but they also held the legal title to a small portion of it.

The resolutions passed by the two latter companies authorized the transfer of not only the property to which these companies had the legal title, but also all their right, title and interest of whatever kind and character in the whole terminal, whether it stood in their names or the names of others. The effect of this was to authorize the transfer of the *ownership* of the property.



Supposing these resolutions had been immediately carried out and these railway companies had executed the deeds authorized: the effect would necessarily have been to have given to the defendant company the beneficial ownership of the whole terminal, but the legal title to only that portion of it which stood in the name of the St. Louis, Des Moines & Northern and the Des Moines & St. Louis companies.

On the same day the board of directors of the defendant, Des Moines Union Railway Company, held a meeting, a record of which appears on pages 432 to 435 of volume II. At this meeting certain resolutions were passed with respect to the subject matter under consideration.

The first paragraph of the resolution is as follows:

“Whereas, the Des Moines & St. Louis Railroad Company, the St. Louis, Des Moines & Northern Railway Company, the Des Moines Northwestern Railway Company, G. M. Dodge and James F. How, both in his individual right and as trustee under the contract mentioned and set out in the Articles of Incorporation of this company, have by their officers and by themselves, personally notified this company that they have each for themselves approved of the organization of this company, and have directed their officers, agents and trustees to surrender and deliver to this company the railroad property and franchises mentioned in said contract, and requested it to take possession of, and maintain and operate the same for the purposes and on the terms mentioned in said contract, and that said railway companies and individual signatories have indicated their desire and purpose to transfer said property to this company in accordance with the terms of said contract.”

This is the only intimation in the evidence that the trustees, How and Dodge, were at this time authorized to transfer any of this property.

The resolution then continues:

“Whereas, it is desirable that this company should at once take possession of said property and maintain, control and operate the same, and that it should procure all necessary conveyances and transfers of the same as soon as practicable, and make provisions for and pay for said property so proposed to be conveyed to it, Now, Therefore, be it Resolved,”

It will be noted that the recitation last above set out, like the resolutions of the three railway companies, includes two propositions:

First. The immediate possession, maintenance, control and operation of the property; and

Second. Procuring all conveyances and transfers of the same and making provision for the payment of said property.

The resolution then continues:

“First.

That this company accepts the transfer and management and operation of said property in the City of Des Moines, east of Farnham street in said city, heretofore owned and controlled by the Des Moines & St. Louis Railroad, Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, and the several others, parties to said contract, and assumes control thereof from this date, so far as

practicable, and it hereby instructs its president to make such order as may be necessary to render such control and management effective, as provided in said contract.”

It will be noted that this portion of the resolution does not say anything about the purchase or conveyance of the property, but only treats of the question of the immediate possession, control and management.

The resolution then continues as follows:

“Second.

“That the President, Vice President, Secretary and Treasurer of this company be, and they are hereby appointed a committee to confer with the several parties to said contract and agree with them severally upon the *terms and price at which they will respectively assign, transfer and convey said railroad property and franchises to this company, and procure from them, and each of them, such conveyance and transfers as may be necessary to fully invest this company with the title, control and management of said properties provided for in said contract of January 2, 1882.*”

This portion of the resolution treats exclusively of the purchase of the property. It authorizes this committee to agree upon the terms and price at which the property is to be transferred and conveyed, and to procure the necessary conveyances and transfers to *fully* invest the defendant company with the *title*, control and management of the property. This is apt language to express the intention of the defendant company to acquire the ownership of this property, and there is nothing in it to suggest that it was contemplated that

the three railway companies were to retain any interest in the property, or that defendant was to pay merely for the privilege of holding the naked legal title.

The resolution then continues:

“Third.

That to enable this company to pay for the property and to maintain, operate and improve the same, and *purchase* other property necessary to carry out *its* objects, and remove any and all liens or incumbrances thereon, and pay off all just claims against the same, the President and Secretary of this company are hereby authorized and directed to issue full-paid capital stock of this company, not to exceed one million (\$1,000,000.00) dollars and not to exceed five hundred (500) bonds of this company, of the denomination of one thousand dollars (\$1,000.00); the form to be agreed upon hereafter by this board.

And to secure said bonds, the President and Secretary are authorized and directed to execute, in the name of this company, a first mortgage or deed of trust, conveying all of said property so to be conveyed to this company or thereafter to be acquired, to a trustee therein named, the form of which deed of trust shall be hereafter determined by this board.

And when said committee shall have agreed with the said several parties to said contract as to the amount of bonds and stocks of this company necessary to be delivered to them, and each of them, in *payment* for said railroad property and franchises, the President and Secretary of this company shall deliver the same to said several parties as each appear to be entitled, on receipt of the conveyances and assignments of said property so to be made to this company.”

Thus we find the defendant company arranging on its own account to raise the funds necessary to pay for the property and to improve the same and acquire other property necessary to carry out the objects of the defendant company, and authorizing the payment for said property upon the execution of the necessary conveyances. The intention of these three railway companies, which, according to complainants' theory, owned this property, to transfer the same in fee simple to the defendant company, and the intention of the defendant company to acquire the ownership thereof, could not be more clearly expressed than by the language used in these various resolutions, and these resolutions simply carry out the thought expressed in the articles of incorporation of the Des Moines Union Railway Company.

No action was immediately taken under these resolutions, probably because about this time the affairs of the Wabash Company were placed in the hands of a receiver and its property transferred to what is known in this record as the Purchasing Committee.

These resolutions, however, remained unrepealed until they were carried out by certain deeds executed by them to the defendant company in the early part of the year 1888, to which we will hereafter call attention.

The subject of the sale and transfer of this property to the defendant company came up at meetings of the directors of the three railroad companies, held on November 5 and 8, 1887, but before considering the action of these various companies at that date, we think it is well to call the court's attention to the mortgage or trust deed which was subsequently given by the defendant company to the Central Trust Company of New York, to secure an issue of bonds, a portion of

which bonds was subsequently delivered to the persons and corporations who had furnished the money for the purpose of acquiring and improving the terminal property. This mortgage appears commencing on page 459 of volume II, and is dated November 1, 1887. It was drawn by Col. Wells H. Blodgett, general counsel for the Wabash Company, one of the most able and conscientious lawyers who ever practiced in this court, and who was apt, as this record again and again shows, in selecting language which accurately conveyed the intention of the parties.

This mortgage, as it will be noted, was prepared before the resolutions of November, 1887, to which we have just referred, and before any transfer of the property was made, and expresses the understanding of Colonel Blodgett, as he looked into the future, of what was intended to be done with this property.

After reciting the date and the parties to the contract, the mortgage provides (p. 460):

•Whereas: The Des Moines Union Railway Company is a corporation duly organized and existing under the laws of the State of Iowa, and as such is fully authorized to *locate, construct, own and operate* a railway in, around and about the City of Des Moines, Iowa, including the construction, ownership and use of depots, freight houses, railway shops, repair shops, stock yards and whatever may be useful and convenient for the operation of railways in said city, and the transfer of cars from the lines and depots of one railway to another, and from said depots to the various manufactories, warehouses, storehouses or elevators, and from one manufactory, warehouse, storehouse or elevator to another, as said depots, manufactories, warehouses, storehouses and elevators are

now constructed or may be hereafter constructed in or around the said City of Des Moines, Iowa, and for such purposes has full right to acquire by purchase and condemnation all such right of way, land and lots as are necessary and proper for the operation and construction of such line of railroad, and to provide itself with depot grounds, yards, shops and other terminal facilities adequate for handling of traffic to be transported upon such railroad, and"

If you will compare this recitation with the articles of incorporation of the Des Moines Union Railway Company, you will at once conclude that when Colonel Blodgett dictated this paragraph he had before him the articles of incorporation of the Des Moines Union Railway Company, and from them ascertained just the powers and purposes of that company.

Colonel Blodgett understood that this corporation was organized, not as a mere depot company for the mere purpose of holding the legal title to this property for the benefit of any one, but for the purpose of constructing, owning and operating a railway in the City of Des Moines.

The mortgage then continues:

"Whereas, the Des Moines Union Railway Company has undertaken and partially completed the construction of a railroad in the City of Des Moines, Polk County, Iowa, extending from the main lines of the Des Moines & St. Louis Railway Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company to a connection with and across the line of various other railroads which center or terminate in the City of Des Moines, and to various manufactories and industries in said

city, and has purchased and owns various structures and buildings used for depots, railway shops, round houses and other structures suitable and useful for railway purposes, and has purchased, acquired and owns by condemnation and otherwise, valuable real estate in said city, and valuable franchises from the City Council of said city, and"

Now the Des Moines Union Railway Company at this time hadn't undertaken and partially completed any railroad in the City of Des Moines or elsewhere. It hadn't purchased, acquired or owned, by condemnation or otherwise, any valuable real estate or franchises in the City of Des Moines or elsewhere. Up to this time it was simply a corporation which had been organized for the purpose of acquiring and owning these things, but Colonel Blodgett in drawing this particular paragraph was looking into the future and planning for doing the things which were afterward done and which gave to the Des Moines Union Railway Company the ownership of the very property to which reference is made in this mortgage. Nothing could more clearly show the intention of these parties than the language incorporated in this mortgage by the person who was furnishing the legal service necessary to carry out the objects of the persons and corporations engaged in this transaction. This wasn't a construction of what had been done, but an expression of what was intended to be done and what was in fact afterward done.

The mortgage then continues:

"Whereas, for the purpose of paying for the property aforesaid, aiding in the construction and extension of said railway, perfecting the title to said property, and completing all necessary and



desirable improvements thereto and thereon, said party of the first part proposes to issue its bonds to the amount of eight hundred thousand (\$800,000) dollars, to be dated on the 1st day of November, 1887, in accordance with the resolutions and orders of its Board of Directors at a duly called and authorized meeting thereof;"

The mortgage then proceeds by its terms to convey to the Central Trust Company the very property which was afterward transferred to the defendant company by appropriate deeds from the three railway companies.

Let us now examine the record and see whether or not the purposes so aptly expressed by Colonel Blodgett in this mortgage were carried out, and for that purpose we wish to call the court's attention to the resolutions of these railway companies passed in November, 1887—a few days after the date of the mortgage in question.

Before doing so, however, we wish again to remind the court that the resolutions already referred to and passed by these railway companies in 1885, authorized not the transfer of the legal title to this property by the trustees, but the transfer of the beneficial interests by the railway companies. In carrying out the plan which is evidenced by the mortgage above referred to, it no doubt came to the attention of the parties that the resolutions of 1884 were defective in that they did not authorize a transfer by the trustees, which was necessary to give to the defendant a perfect title to the property, and therefore the resolutions now referred to were passed by the railway companies.

The resolutions of the St. Louis, Des Moines & Northern Railway Company will be found on pages 435 and

436 of volume II. They recite the fact that James F. How had acquired the title to certain property in the City of Des Moines with money furnished by the Wabash Company; that by an agreement between this company and the Wabash Company and others, it was intended that the said property should be transferred to the Des Moines Union Railway Company; and they then authorize Mr. How to transfer said property to the Des Moines Union Railway Company upon receiving from said company a stipulation that as soon as practicable thereafter the defendant railway company shall deliver to him first mortgage bonds to the amount of money advanced for the payment of said property and improvements, with interest and taxes paid thereon, and also three-fourths of the stock of the Des Moines Union Railway Company, the said bonds and stock when received to be transferred by How to the Purchasing Committee of the Wabash Company. They also recite the fact that Grenville M. Dodge had purchased certain property as trustee, and the fact that in accordance with the contract above mentioned it was intended that said property should be transferred to the Des Moines Union Railway Company; and they then direct General Dodge to transfer said property to the Des Moines Union Railway Company upon receiving from said company a stipulation that as soon as practicable the railway company should deliver him bonds for the amount of money he had advanced in payment for the terminal property and improvements, interest and taxes, and also one-fourth of the capital stock of the Des Moines Union Railway Company.

In explanation of the fact that the Purchasing Committee was to receive three-fourths of the capital stock of the Des Moines Union Railway Company, it may be

noted that at this time the Purchasing Committee were entitled, in equity at least, to whatever was coming to the Des Moines & St. Louis Railroad Company and the Des Moines Northwestern Railway Company; and General Dodge was entitled to whatever was coming to the St. Louis, Des Moines & Northern Railway Company.

Similar resolutions were passed by the directors of the Des Moines & St. Louis Railroad Company (vol. II, pp. 437-9). There were present at the meeting of the Des Moines & St. Louis Company, among others, James F. How, Vice-President of the Wabash Company, and Col. Wells H. Blodgett, general counsel for the Wabash Company and the Purchasing Committee.

In addition to the resolutions similar to those passed by the St. Louis, Des Moines & Northern, the Des Moines & St. Louis Company passed the following resolution, which was offered by James F. How (vol. II, p. 439):

“Resolved, that the President and Secretary of this company, he and they are hereby authorized and directed to execute to the Des Moines Union Railway Company a deed conveying to it all its real estate rights of way, franchise, road bed and other property of said company lying and being in the City of Des Moines, east of Farnham Street, whether the same was acquired by grant from City of Des Moines or by purchase or condemnation, this resolution being offered for the purpose of carrying out the contract of date January second, 1882, entered into by and between this company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company and others.”

Thus again authorizing a transefr by the Des Moines & St. Louis Railroad Company of its beneficial inter-

est in the property which stood in the name of the trustees.

The record does not show the resolutions themselves that were passed at the time by the Des Moines Northwestern Railway Company, but the complainants offered in evidence a notice served by the Des Moines Northwestern Railway Company on the Des Moines Union Railway Company at this time, notifying the latter company that it had passed similar resolutions. This appears as plaintiffs' exhibit 15, page 442, volume II.

We therefore find in the record resolutions of the three railway companies, which, the complainants admit, were the real owners of this property, authorizing a transfer of the property both by these corporations and the trustees, in consideration of the defendants' capital stock and bonds, the latter representing the amount actually invested in the purchase and improvement of the property, with interest and taxes thereon.

In pursuance of these resolutions, James F. How executed and delivered to the Des Moines Union Railway Company three deeds, and G. M. Dodge and wife one deed, which appear in volume II, pages 446 to 454. The St. Louis, Des Moines & Northern Railway Company and the Des Moines & St. Louis Railroad Company each executed a deed to the Des Moines Union Railway Company, which deeds appear on pages 455 to 459 of volume II. These deeds were prepared or approved by Colonel Blodgett.

On January 31, 1888, James F. How, Vice-President of the Wabash, wrote to J. S. Peck, of Des Moines, Iowa, enclosing what he refers to as "deeds from General Dodge to the Des Moines Union Railway Com-

pany," which he says, "Colonel Blodgett has examined and pronounces all right" (vol. IV, p. 1587).

On the next day, Mr. Polk writes to Mr. How, saying:

"Your letter of the 31st ult. enclosing two deeds, one from the St. Louis, Des Moines & Northern, and the other from G. M. Dodge, to the Des Moines Union Railway Company for certain property in Des Moines is received.

We delivered to General Dodge the contract of the Des Moines Union Railway Company, to give him the bonds, and stock of the company when the same are issued, in payment for said terminals. If the deeds are satisfactory to you we will put them on record at once." (Vol. IV, pp. 1587-8.)

On February 13, 1888, Mr. How wrote to Mr. Polk as follows:

"Enclosed please find a deed from the Des Moines & St. Louis Ry. Co. to the Des Moines Union Ry. Co. for the property owned by the former Co. in Des. Moines. Please have same executed by Mr. Clarkson as President, and by Mr. Hubbell as Secretary and return same to me as Mr. Blodgett wishes to see that it is properly executed before it is put on record.

*I understand that the Des Moines Northwestern Ry. make no deed as they have no property in Des Moines to transfer. Am I correct about this? If not, I would like to see their deed before it is recorded."* (Vol. IV, p. 1588.)

On February 21, 1888, Mr. Polk replied:

"I herewith enclose deed from the Des Moines & St. Louis Railroad Company to the Des Moines Union Railway Company, which you forwarded to.

us for execution. The same has been signed by Mr. Clarkson, and Mr. Hubbell, and properly acknowledged. Hope you will find it all satisfactory." (Vol. IV, pp. 1589-90.)

The deed from the St. Louis, Des Moines & Northern Railway Company appears on pages 455 and 456 of volume II, and after describing the particular pieces of property which stood on the record in the name of the St. Louis, Des Moines & Northern Railway Company, the deed continues:

“ \* \* \* Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest in the above described property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances. To Have and to Hold all and singular the above mentioned and described premises together with the appurtenances, unto the said parties of the second part and assigns forever.”

The property which was transferred by this deed was a part of the terminal property. It is the theory of petitioners that the St. Louis, Des Moines & Northern Railway Company retained some interest in the property itself. In view of this contention, we would like to inquire what possible interest, easement or equity the St. Louis, Des Moines & Northern Railway Company could have had in this property that was not transferred by the terms of this deed. We are unable

to formulate or conceive of more apt and complete language to transfer every possible interest in real estate. This deed not only transferred the legal title, but whatever equity, right or easement the grantor had in the property. It clearly shows the intention to give to the Des Moines Union Railway Company a perfect title to the property.

When we come to examine the deed of the Des Moines & St. Louis Railroad Company to the Des Moines Union Railway Company, we think there can be no question about it. It will be remembered that while, under the contract of 1882, the Des Moines & St. Louis Company owned a half interest in the terminal property, the title to only a small portion of it stood in its name. This deed, after describing the property which stood in its name, continues as follows (p. 458):

\*\*\* \* \* And all of the real estate within the City of Des Moines, Iowa, which is the property of the grantor, together with all real estate which may hereafter be acquired by this grantor either by condemnation proceedings or otherwise. Also all its embankments, bridges, turnouts, side-tracks, buildings and structures, water tanks and fixtures, shops, engine and other houses, depots, turntables and all its railroad property acquired and to be acquired, and everything appurtenant to said railroad, and all franchises and rights it may have acquired by grant, donation, purchase or otherwise, and particularly all rights, franchises and privileges granted by the City of Des Moines, Iowa, under an ordinance 'granting the right of way to the Des Moines and St. Louis Railroad Company and its assigns, over, across, along and upon certain streets and alleys in the City of Des Moines, Iowa, and the right to bridge the Des Moines River on the south alley in said city be-

tween Court Avenue and Vine Streets.' And the said Des Moines and St. Louis Railroad Company hereby covenants to Warrant and Defend the said premises against all the lawful claims of all persons whomsoever, claiming by, through or under it. Signed this 21st day of February, A. D. 1888."

What more appropriate language could have been selected to transfer to the Des Moines Union Railway Company not only the property specifically described in said deed, but all the railroad property which the grantor had in the City of Des Moines, and which, according to the theory of petitioners was a half interest in the property which stood in the name of How and Dodge? Note, also, that the Des Moines & St. Louis Railroad Company covenants to warrant and defend the premises against the lawful claims of all persons whomsoever, claiming by, through or under it. The plaintiff, the Wabash Railway Company, claims under it (the Des Moines & St. Louis Company).

The Des Moines Northwestern Railway Company did not make a deed because there was no property standing in its name. It had, however, as we have shown, authorized a transfer of all its interest in this terminal property, and it or its successors received the purchase price agreed upon, as we will hereafter show. Also, the St. Louis, Des Moines & Northern Railway Company or its successors, as well as the Des Moines & St. Louis Company or its successors, received the consideration.

These deeds were put upon record soon after their execution, and on May 1, 1888, the Des Moines Union Railway Company took possession of the terminal property and has ever since possessed and operated it.



The mortgage of the terminal property, which was prepared in Novmeber, 1887, before the actual transfer of the property to the Terminal Company, was now, after the transfer had been completed, executed and placed of record. The bonds secured by it were negotiable in form and were designed to be sold in the open market. Had there ensued a default and foreclosure what estate would have passed to the purchaser at the foreclosure sale? Certainly nothing less than an absolute estate. But it could not have been more than passed to the Terminal Company. And if that Company got only the legal title in trust, if the entire beneficial interest remained in the three railway companies, and that interest was inalienable, then the bonds and mortgage were nothing more than counters in a scheme of fraud. The right, title and interest of the Des Moines Union in this property, from the time it got it until now was what it was, when it made this mortgage. True it could not, under its articles of incorporation, encumber this property without the approval of the three railway companies, its stockholders, but this restriction upon the mode of its corporate action did not qualify its estate in its property. The railway companies approved the mortgage as required, but they did not extend its scope to their own property. They simply did "ratify and approve the execution of the mortgage to the Central Trust Company by the Des Moines Union Railway Company upon all *its* property and franchises to secure the issuance, etc." (R. 474.)

We claim that by reason of the facts hereinbefore referred to—the articles of incorporation of the terminal company, the resolutions of the three railway companies proposing to sell the property to the terminal company, the resolutions of the terminal company

accepting this proposition, the execution and delivery of the deeds to the property, the payment of the purchase price to the parties entitled thereto, the taking possession of the property by the terminal company—the terminal company became the absolute owners of the terminal property, and that the ownership of the three railway companies in the terminal property was changed to the ownership of the capital stock of the terminal company.

**THE CONTRACT OF MAY 10, 1889, AS BEARING  
UPON THE INTENTION OF THE PARTIES.**

If there can now be any doubt who owned this property after May 1, 1888, let us see what the parties themselves had to say about it after the consummation of the transaction, because if they thought that the Des Moines Union Railway Company then owned this property, there is no occasion for the court to inquire further into it. Fortunately we have in the record the undisputed agreements of these parties with reference to the title, in a contract which was introduced by the complainants.

For some reason or other, counsel for complainants have never seemed to understand just what we claim for the contract of May 10, 1889, as applied to this branch of our case. Counsel for the Milwaukee, on page 59 of the Court of Appeals brief, says:

“it is the contention of the defendants that this contract of May 10, 1889, killed that of 1882, and terminated all rights of the Railway Companies to use the property after May 1, 1918, because the supplemental contract covers a period of time up to that date only.”

And counsel for the Wabash Company, on page 131, Court of Appeals brief, says:

"Defendants have contended that by the execution of the contract of 1889 the Railway Companies intended to rest their right to use the terminal property on the provisions of that contract, and are by that contract estopped from asserting a claim to the terminal property adverse to the depot company, and have argued that the Railway Companies thereby released any claim to an easement in the terminal property."

Neither of these statements correctly states our position with relation to this contract. Our position is, *first*, that it having been deliberately prepared, considered, and executed by the parties, and approved by the formal action of their boards of directors, is of the highest value—of the greatest probative force—because of its interpretation of the intention of the parties by their prior transactions.

Second: It is of importance when we come to consider the defense of estoppel and laches, which we will hereafter discuss.

The title and ownership of this property were not transferred to the terminal company by reason of the contract of May 10, 1889, but by reason of the things that had gone before and to which we have referred.

Upon taking possession of the property by the defendant company, the question of the terms upon which the defendant should furnish to these railway companies terminal services became a subject of negotiation, which resulted in a written contract, dated May 10, 1889, between the defendant company as party of the first part, and the Des Moines & St. Louis Railroad

Company, the Des Moines & Northwestern Railway Company (successor of the Des Moines Northwestern Railway Company), and the St. Louis, Des Moines & Northern Railway Company, parties of the second part, which contract appears commencing on page 479 of volume II. This contract was drawn by Colonel Blodgett, general counsel of The Wabash Railroad Company and the Des Moines & St. Louis Railroad Company, who had guided these transactions and who knew the situation and what was intended by the parties. We therefore not only have the written statement of the interested parties as to the title to this property, so far as it is contained in this contract, but we have such written statement in the language of one who knew how to select words apt for the purpose of expressing his understanding.

The contract, after reciting the date and the parties to it, says:

“Whereas, the said party of the first part (Des Moines Union Railway Company) is the owner of valuable terminal facilities in the City of Des Moines, Iowa, as hereinafter described; and”

Now neither Colonel Blodgett nor the parties to this contract, who were the only ones interested in it, had any doubt at this time as to who the owner of the property was. They agree that it was the defendant, the Des Moines Union Railway Company.

Th contract then says:

“Whereas, the respective parties of the second part have railroads in the State of Iowa which terminate at, or run into and through said City of Des Moines, and in order to prevent unnecessary

expense, inconvenience and loss attending the accumulation of a number of stations, and in order to facilitate the public convenience and safety, it has become important that said second parties should have the use of the *terminal facilities of said first party*; and"

Again we have the agreed statement of these parties that the ownership was in the defendant.

The contract continues:

"Whereas, said party of the first part has become incorporated and organized under the laws of the State of Iowa for the purpose of *owning and operating* a line of railway in the said City of Des Moines, Iowa, extending from the eastern boundary line of said city to Farnham Street, in the western part thereof; and"

There is no pretense here that the defendant corporation was organized for the purpose of acting as trustee or holding the naked legal title to this property, but on the contrary these parties agree that it was organized for the specific purpose of owning and operating this terminal property—something never contemplated in the contract of January 2, 1882.

The contract then continues:

"Whereas, said party of the first part, in pursuance of said charter has *acquired* and now *owns* a railway in said city, as above set forth, and has *already acquired or constructed* a large number of valuable main and side tracks, depots, depot grounds, lands, yards, shops, round houses, freight houses and other terminal facilities, and *intends to acquire and construct more*; and"

This is the language selected by Colonel Blodgett and adopted by all the parties interested, to state the result of the transactions which we have been heretofore considering.

The contract then continues :

"Whereas, said second parties are each desirous of having the right to use said terminals in connection with their respective railroads; and"

Why, let us inquire, were each of the parties of the second part desirous of acquiring by contract the right to use these terminals if they already had that right, as is claimed by counsel for petitioners?

The contract then continues :

"Whereas, for the protection of the parties hereto and their assigns, it is important that the rights, duties, and liabilities of each in regard to the whole subject-matter of said terminal facilities, including their use, care, control, rental, taxes, expenses, renewals, insurance, and repairs, shall be stated and defined.

Now, therefore, in consideration of the premises, it is mutually agreed by and between said party of the first part and each of the several parties of the second part (each of said second parties contracting for itself), as follows."

The contract then provides what the defendant company shall do in respect to acquiring further terminal property, improvements thereon, and the amounts which the tenant companies are to pay for the use of the property, and then provides that in consideration thereof the defendant company grants to the said second parties the use of the terminal property.

The contract goes into considerable detail as to how the property is to be managed, etc., not necessary here to refer to; provides how the capital stock of the defendant company shall be distributed among the three railway companies, and then says (section 27, p. 487):

“Whereas, the parties of the second part have herein and hereby obligated themselves to pay as a part of the compensation for the use of said premises a sum sufficient to pay the interest on the whole number of bonds issued and used, or to be hereafter issued and used by said first party in purchasing, improving and equipping the terminal properties herein described;

Now, therefore, in consideration of the premises, the said first party hereby contracts and agrees to and with each of the second parties hereto, that it will not at any time hereafter issue or dispose of any of said bonds, except for the purpose of purchasing with them or their proceeds additional terminal property, or for improving or equipping that now owned by it in said City of Des Moines.”

Note that the reason given in the contract for limiting the right of the defendant company to issue its bonds is that the parties of the second part had agreed to pay the interest on the bonds. If the parties of the second part thought they were the real owners of this property, they would have been interested in the principal of these bonds rather than in the interest on them. They were not interested in the principal because they were not the owners of the property, and their only obligation with respect to the bonds was the contract obligation to pay the interest.

Another significant thing about this contract is the provisions therein contained with respect to the sale and transfer of the capital stock of the terminal com-

pany and the assignment of the rights of either of the three railway companies acquired by the terms of the contract.

It will be remembered that the articles of incorporation of the terminal company placed no restriction on the right of its stockholders to sell and transfer its capital stock, or any part thereof, the result being that any stockholder might freely sell and transfer any portion of his stock. The three railway companies having intended to control the management and operation of the terminal property, the reason for their desiring to in some way limit the right to transfer this stock is apparent. It was therefore provided in section 24 of the contract (p. 485) as follows:

"It is understood and agreed that the Des Moines & St. Louis Railroad Company, as the owner of one-half of the capital stock of the Des Moines Union Railway Company, may sell and transfer one-half of said stock, or one-quarter of the whole to such railway company as may be acceptable to a majority of the parties of the second part; in which case it is agreed that said railway company which may become the purchaser of said stock, may be admitted as one of the parties hereto, of the second part, upon the same terms and conditions as those stipulated for the other parties of the second part."

It is now contended by petitioners that the terminal company was a "mere agency" for the railway companies, having no valuable interest in the terminal property, and therefore that the stock was "merely nominal and of nominal value," because it represented no valuable interest in the property. If this theory be true, what would any railway company have received



in consideration for the money paid for one-half of the terminal stock owned by the Des Moines & St. Louis Company? Merely the right to become a party of the second part to the contract of May 10, 1889, and the possession and ownership of some nicely lithographed pieces of paper. Its rights under the contract of May 10, 1889, would have expired at the end of thirty years from that date. As the owner of the stock, it would have had no rights because, as counsel claim, that didn't represent anything of value.

To illustrate: The record shows that negotiations were subsequently entered into to sell this stock to the Chicago & North Western Railway Company and secure the entrance of that company on the terminal property. Supposing these negotiations had been successful and after the North Western Company had paid its money for this stock it had been told that this stock didn't represent anything of value and that the only right it gave was the right to become a party of the second part to this contract and the privilege of paying its share of the expenses during the existence of such contract; would the North Western Company have felt that it had been fairly dealt with?

We do not think the persons who were instrumental in these transactions and who conducted these negotiations had any such purpose in their mind, nor can we bring ourselves to think that the Purchasing Committee of the Wabash Company and the others who had relations with the subsequent sale of the stock of the terminal company to the Hubbells, which included Colonel Blodgett, James F. How, Charles M. Hays, and others, had in their minds any purpose of swindling Mr. Hubbell and General Dodge when they sold them stock in the terminal company.

It is apparent from these provisions in the contract, as well as the provisions of section 25 (p. 486), which related to a sale and transfer of stock, that the parties understood that this stock represented a valuable interest in the terminal property.

Again, by section 25 of the contract (p. 486), it was attempted to control the right of each of the three railway companies to assign and transfer the rights which they obtained under the terms of the contract. If we are to believe the present theory of counsel for petitioners the three railway companies didn't obtain any rights under this contract, notwithstanding the fact that the contract purports to grant them rights, because they say that the contract was merely a formality, that it was really an arrangement between the three railway companies to regulate, as between them, the use of the property. But it seems to us that this theory is too absurd to warrant further discussion.

That the present theory of petitioners with relation to their rights in the terminal property never occurred to anyone until the commencement of this suit is demonstrated by the fact that the three railway companies and their successors at all times thereafter, when transferring or mortgaging their interest or rights in the terminal property, described them as their rights acquired under the contract of May 10, 1889, and the contract of July 31, 1897 (the ratification contract), and the capital stock of the terminal company owned by them. And this is particularly true of the mortgage of The Wabash Company executed in 1889 under the guidance of Colonel Blodgett, to which more particular reference will hereafter be made.

What better evidence could we ask of ownership of this property than the contract or statement signed by

all the parties immediately or soon after the transaction by which the property was transferred to the defendant company, and a statement drawn by one who not only knew what the understanding was, because he had been a party to the transactions, but who had the capacity to accurately state it?

The contract of January 2, 1882, according to its language, contemplated that the terminal property should be owned by the three railway companies, though the title should stand in the name of a trustee, which might or might not be a corporation. Now what have we up to this point which evidences the fact that these three railway companies intended to and did change their plans from an ownership by the three railway companies, to an ownership by an independent corporation. Briefly stated, the facts are as follows:

1. The organization of a corporation at the instance of these three railway companies for the purpose of, and with the power to, own and operate a terminal railway in the City of Des Moines, Iowa, and with the express power of acquiring by purchase the ownership of the particular terminal in question. This corporation was the defendant, the Des Moines Union Railway Company.

2. The intention expressed prior to the transfer of the ownership of the property, that the Des Moines Union Railway Company should acquire the title to the property. This intention was expressed by the mortgage prepared by Colonel Blodgett on November 1, 1887, from the Des Moines Union Railway Company to the Central Trust Company, and afterward executed by the terminal company.

3. The resolutions of the three railway companies and of the terminal company passed in January, 1885, and November, 1887. These resolutions authorized the transfer of the ownership of the terminal property in consideration of its stock and bonds.

4. The deeds executed and delivered to the Des Moines Union Railway Company in 1888, by the terms of which every possible interest which the parties had in the property was transferred.

5. The payment of the agreed purchase price and delivery of the property.

6. The written statement prepared by Colonel Blodgett and executed by all the parties interested in the property, reciting the fact that the Des Moines Union Railway Company had by these transactions acquired the ownership of the property. This written statement was contained in the written contract of May 10, 1889.

This evidence is not the oral evidence of witnesses who attempt to state their recollections of transactions happening a quarter of a century prior to the time of the giving of their evidence, but consists of the solemn and formally executed instruments at the time the transactions occurred and about which there is no controversy.

If there is, however, any lingering doubt in the mind of the court as to the effect of the transaction in which this property was transferred to the defendant company, let us examine a transaction which occurred in the early part of the year 1890—less than two years after the property was delivered to the defendant company, and in which the actors were the same persons who had been active in the management of not only

the terminal property, but of the interests of the other railroads therein from the very beginning, and who, if anybody, knew and appreciated the situation. This transaction was the amendment to the articles of incorporation of the defendant company which was consummated on April 8, 1890.

**AMENDMENTS TO ARTICLES OF INCORPORATION OF DES MOINES UNION RAILWAY COMPANY.**

The complainants challenge the validity and effect of these amendments—a subject which we will discuss in a subsequent division of our brief—but for the present we are only inquiring as to the intention of the parties to the transaction by which this property was transferred to the defendant company, and for the present we will only consider the record in respect to these amendments for that purpose.

These amendments were adopted at an adjourned meeting of the stockholders of the Des Moines Union Railway Company held on April 8, 1890. A record of that meeting appears in volume II, commencing on page 488. There were present, among others, James F. How, Vice-President of the Wabash Company, and who had been intimately connected with this terminal transaction as a representative of the Wabash Company since its inception; C. M. Hays, who was general manager of the Wabash Company and had been with that company since 1883; A. B. Cummins, who was local attorney for the Wabash Company in Des Moines and represented it on the board of directors of the defendant company, and who was also general counsel for the defendant company. G. M. Dodge and Wells

H. Blodgett were both present by proxy, the former being represented by L. M. Martin, and the latter by J. F. How. Both General Dodge and Colonel Blodgett signed and acknowledged the amendment to the articles after they were authorized. There were also present F. M. Hubbell, L. M. Martin and F. C. Hubbell, all of whom had been familiar with the terminal proposition either from the beginning or during its early stages. These parties knew what was intended by the transactions under consideration, and they were all honorable, able and upright men.

After the organization of the meeting, C. M. Hays moved that article 2 of the original articles be stricken out and that there be enacted in lieu thereof the following (p. 490):

“Article 2.

*The object of the corporation and the general nature of the business to be transacted shall be the purchase, lease, construction, ownership, maintenance and operation of a system of railway in, around and about the City of Des Moines, Polk County, Iowa, including the construction, purchase, ownership, maintenance and use of a union depot, depots, freight houses, railway shops, repair shops, stock yards and whatever other things may be useful or convenient for the operation of railways at terminal stations, as well as the transfer and switching of cars from the line or depot of one railway to another, or from the various manufactories, warehouses, elevators or other sources of traffic to each other or to any of the railways or depots thereof, now constructed or hereafter to be constructed in or around said City of Des Moines, and also to lease terminal facilities to and furnish and perform terminal services for all railways whose lines reach or pass through or near the said*

City of Des Moines, and the corporation shall possess all the power conferred upon railway corporations by the laws of the State of Iowa, including the power to condemn private property for its use."

This motion was adopted and thereby there was stricken out of the article all reference to the contract of January 2, 1882, and thereby the thought that it was intended that the defendant company should acquire absolute title to the property is corroborated.

L. M. Martin moved that article 3 be stricken out and the following enacted in lieu thereof (p. 490):

"Article 3.

"The capital stock of the corporation shall be two million dollars (\$2,000,000.00) which shall be divided into shares of one hundred dollars each; said shares shall be paid for and issued in the manner following and not otherwise; *four thousand shares as a part of the purchase price of the terminal property originally acquired by the corporation, it being now agreed by all the stockholders that said sum of four hundred thousand dollars, together with the first mortgage bonds theretofore issued for that purpose constituting the fair value of said property when so acquired; and all resolutions and proceedings of the corporation heretofore had with respect to the amount of capital stock to be issued as such purchase price, are set aside and held for naught.*

Said four thousand shares of capital stock shall be issued to the following corporations and in the following proportions:

Two thousand shares to the Purchasing Committee of the Wabash, St. Louis & Pacific Railway Company, successor in ownership to the Des

Moines & St. Louis Railroad Company, and the present owner of the property known as the Des Moines & St. Louis Railroad.

One thousand shares to the Des Moines & Northwestern Railway Company, successor to the Des Moines Northwestern Railway Company, and

One thousand shares to the Des Moines & Northwestern Railway Company, successor to the St. Louis, Des Moines & Northern Railway Company, *and the said shares are hereby declared to be fully paid by the transfer of the aforesaid property.* The remaining capital stock, to-wit: sixteen thousand shares, or any part thereof, shall be issued only by the authority of a resolution of the stockholders adopted by the vote of more than seven-eighths of all the stock theretofore issued and shall be fully paid either in money or property at its fair market value, before certificates therefor shall be executed and delivered."

This resolution was unanimously adopted by all present and language could not be conceived more appropriate to express the thought that the defendant company had acquired an absolute title to this property in consideration of the bonds and stock issued.

In order to protect the companies in the control of the defendant company through their stockholding interest, article 4, as amended, provided that the affairs of the company should be managed by a board of eight directors, but that at all future elections of directors it shall require the vote of more than seven-eighths of all the stock theretofore issued, to elect any director. Thus no new directors can be elected without the unanimous consent of all stockholders holding five hundred or more shares of the capital stock. This article also provided that in all matters other than the ordinary



operation of the property, the board of directors can only act upon the unanimous vote of eight members thereof, and gives the power to each director to delegate by written authority some other person to vote for him. The other amendments to the articles are immaterial for the purposes for which we are now considering them, except article 15 (p. 494), which provides as follows:

“The proceedings of a meeting held December 10, 1884, with certain preambles, including a contract executed on the 2nd day of January, 1882, between the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, consented to by the Wabash, St. Louis & Pacific Railway Company, which now appears as part of the Articles of Incorporation of this Company, *are hereby repealed, stricken out and expunged.*”

It is interesting to note that the only reference to the contract of January 2, 1882, to be found in the record, from May 1, 1888, up to the time of the commencement of this suit (almost twenty years) is the reference found in the record of this meeting of April 8, 1890, when it was formally revoked.

The contract of January 2, 1882, could not, of course, be changed or abrogated by third parties. It was in that sense inviolate, but it was not any more than any other contract immutable and irrevocable by the unanimous agreement and action of the parties themselves. And here we have in these amendments to the articles of the Des Moines Union, an absolute revocation of the contract and the action making the revocation—the amendment to the articles—is not the

action of the Des Moines Union itself, but of its stockholders, and they are the parties and all the parties (or successors in right and title), to the original contract.

In addition to adopting the amendment to the articles of incorporation and authorizing their filing and publication, the following resolution, offered by A. B. Cummins, was passed by a unanimous vote of all the directors present: (P. 494.)

“Whereas, by inadvertence, there appears to be some uncertainty in the records of the Company respecting the purchase price of the terminal property originally acquired by the company, and

*Whereas, it was the agreement between all the parties in interest that said property, including the franchise incident thereto, should be purchased at its fair value, payable partly in first mortgage bonds and partly in capital stock fully paid up, and*

Whereas, it was and is agreed that said property was fairly worth the sum of eight hundred sixty-one thousand two hundred and fifty-seven and 21-100 dollars, of which purchase price the Des Moines & St. Louis Railroad Company, the Wabash, St. Louis & Pacific Railway Company or its representative, the purchasing committee, the said purchasing committee being now the real owner of the Des Moines & St. Louis Railroad, together were and are entitled to four hundred and seventy thousand one hundred and ten and 80-100 dollars (\$470,110.80) of said purchase price, the Des Moines Northwestern Railway Company was entitled to two hundred and fifteen thousand and fifty-eight and 40-100 dollars (\$215,058.40) of said purchase price, the St. Louis, Des Moines & Northern Railway Company was entitled to one hundred thousand dollars (\$100,000.00) of said purchase price. G. M. Dodge to seventy-four thousand and eighty-eight and 01-100 dollars (\$74,088.-

61) of said purchase price and Polk & Hubbell to two thousand dollars (\$2,000.00) of said purchase price, and

Whereas, by a settlement heretofore had and now confirmed, it appeared that of such purchase price the purchasing committee of the Wabash, St. Louis & Pacific Railway Company, being the real owner of the railroad known as the Des Moines & St. Louis Railroad, has received two hundred and seventy (270) bonds of one thousand dollars each. G. M. Dodge seventy-four bonds; Polk & Hubbell two (2) bonds and the Des Moines & Northwestern Railway Company, successor of the Des Moines Northwestern Railway Company, one hundred and fifteen (115) bonds, making in all four hundred and sixty-one bonds, and as a further part of such purchase price the company has paid to the purchasing committee, G. M. Dodge and the Des Moines Northwestern Railway Company two hundred and fifty-seven and 21-100 dollars in cash, and

Whereas, there still remains four hundred thousand dollars (\$400,000.00) of the purchase price of said property yet unpaid, which sum is to be paid in capital stock, and

Whereas, by agreement between the several persons and corporations owning the said property prior to the said transfer, so much of the purchase price as was to be paid in capital stock was to be divided among three corporations, to-wit: one-half to the Des Moines & St. Louis Railroad Company, one-quarter to the St. Louis, Des Moines & Northwestern Railway Company and one-quarter to the Des Moines Northwestern Railway Company, and

*Whereas, the purchasing committee of the Wabash, St. Louis & Pacific Railway Company is now the owner of the property of the Des Moines & St. Louis Railroad Company, including its proportion of stock, and the Des Moines & Northern Railway Company is now the owner of the property of the*

*St. Louis, Des Moines & Northern Railway Company, including its proportion of said stock, and the Des Moines & Northwestern Railway Company is now the owner of the property of the Des Moines Northwestern Railway Company, including its proportion of said stock, and*

Whereas, the articles of incorporation have been amended so as to conform to the true intent of the several parties,

First. That the *purchase price* of the property originally acquired by the company, as above stated, be fixed at said sum of eight hundred sixty-one thousand two hundred fifty-seven and 21-100 (\$861,257.21) dollars as of the date of the conveyance thereof.

Second. That the payment of a portion of such *purchase price* in first mortgage bonds, as above set forth, be confirmed and approved.

Third. That to complete the *payment of such purchase price*, the President and Secretary are hereby authorized to issue certificates for thirty-nine hundred and ninety-two (3992) shares of stock, which shares, including eight already issued on behalf of said parties, aggregate four thousand (4,000) shares, as follows:

To the purchasing committee of the Wabash, St. Louis & Pacific Railway Company, nineteen hundred and ninety-six (1996) shares.

To the Des Moines & Northern Railway Company nine hundred and ninety-eight (998) shares, and to the Des Moines & Northwestern Railway Company nine hundred and ninety-eight (998) shares.

Fourth. That the proceedings heretofore had respecting the issuance of capital stock, so far as such proceedings are inconsistent with said amendments to the articles of incorporation or with this resolution, are hereby modified to conform heretofore."

This resolution and preamble were unanimously adopted by all the stockholders present. We have therefore set out here in detail the understanding of all the persons who were active in the transactions under consideration and in whose mind there is apparently no question but that the defendant company purchased something with its more than \$861,000.00 which it paid, and that something which it purchased was the terminal property.

Not only was this the expression of the persons who were present at this meeting, but this was the expression of the railway companies themselves, who, as successors of the original parties to the contract, were present, because this was a stockholders meeting and this was the act of the stockholders, among whom were numbered these railroads, and not the act of the Des Moines Union Railway Company as a separate identity. But upon this thought we will enlarge in another division of our argument.

These amendments were adopted with great deliberation after full notice and information to all in anywise concerned. They seem to have originated with Mr. Cummins, who at the time was counsel for the Wabash, for the Des Moines Union, and for General Dodge, who was virtually the owner of the Des Moines and Northern. He suggested the need of amendments at the meeting of stockholders of the Des Moines Union on January 3, 1890. On January 22d he wrote to Col. Blodgett concerning the matter and proposed a conference. He discussed the matter with Mr. Hays, who was general manager of the Wabash. On January 27th he wrote to General Dodge enclosing a copy of the proposed amendments and discussing them. He spoke to Mr. Hubbell, who at first was opposed to them. (Rec.,

Vol. III, pp. 1210 to 1214.) Mr. Cummins, who testifies to this, produces the letters written by him at the time. And the records of the Company show the facts in greater detail.

At the meeting of January 3d Mr. How, then Vice-President of the Wabash, and Mr. Hays, General Manager of the Wabash, were present as Wabash representatives. Mr. How moved and it was carried "that the question of amending the articles of incorporation of this Company, as well as the question concerning the issuing of stock for the purchase price of the terminal property, be referred to attorneys, W. H. Blodgett and A. B. Cummins for their investigation and recommendation." (Rec., Vol. IV, p. 1307.) General Dodge presided at this meeting. He represented the Des Moines and Northern. F. M. Hubbell was present representing the Des Moines and Northwestern. Thus the three railway companies were all represented. The meeting adjourned to February 18th.

At the adjourned meeting Dodge, How, Hays and Blodgett were represented by proxy. The Secretary reported that he had notified each stockholder of the meeting and that amendments to the articles of incorporation would be offered. Mr. Cummins presented the amendments. On motion of Mr. Hubbell the meeting was adjourned to April 8th to give further opportunity to examine the amendments. (Rec., Vol. IV, p. 1311.)

At the April meeting the Wabash representatives present were How and Hays. Col. Blodgett was represented by proxy as was General Dodge. Mr. How presided. The remaining railroad representatives were present in person. At this meeting one by one the amendments were adopted. (Rec., Vol. II, pp. 488 et seq.)

Thus it was not until more than three months after the matter was broached and after every stockholder had had months of notice that the final action was taken. It will not now serve to say that they knew not what they did.

And when these articles were amended everybody in interest knew that stock of the Des Moines Union had on February 5, 1890, been sold to individuals, five hundred shares to General Dodge and the same number to F. M. Hubbell. At the directors' meeting of the Des Moines Union held on the same day as the stockholders' meeting Mr. Hays moved and the Board adopted the following resolution:

"Resolved, That the shares of the capital stock of this corporation of the par value of fifty thousand dollars sold by the Purchasing Committee of the Wabash St. Louis & Pacific Railway Company to F. M. Hubbell, which sale has been ratified by the Des Moines & St. Louis Railroad Company, be approved and the transfer thereof to said Hubbell upon the books of the company be and the same is hereby ordered." (Rec. vol. IV, p. 1312.)

A like resolution respecting the sale of shares to General Dodge was offered by Mr. Cummins and was adopted.

Thus the amendments in question were made with full knowledge that shares of stock of the Des Moines Union were held by individuals as well as by railway companies. This was in harmony with the laws of Iowa and by all concerned was regarded as consonant with the purpose of the parties in respect of the terminal property.

## THE ISSUE, SALE AND TRANSFER OF THE CAPITAL STOCK OF THE DES MOINES UNION RAILWAY COMPANY.

The disposition of the capital stock which was issued by the defendant company in part payment for the terminal is important not only as bearing upon the intention of the parties in relation to title to the property, but also on the issue of estoppel which is set up in the defendants' answer.

It will be remembered that by the terms of its original articles, the defendant's capital stock was fixed at \$1,000,000.00, all of which it was contemplated should be issued in payment for the terminal property. Likewise, the resolutions of January 1, 1885, authorizing the transfer of the ownership of the terminal property to the defendant, contemplated that defendant would issue its capital stock in payment therefor to the persons or corporations entitled thereto, who were presumably the three railroads parties to the contract of January 2, 1882, and this would be in the following proportions:

One-half to the Des Moines & St. Louis;

One-fourth to the Des Moines Northwestern;

One-fourth to the St. Louis, Des Moines & Northern.

In considering this issue, it is well to keep in mind that the Wabash Company was the owner of all the stock and bonds of the Des Moines & St. Louis Company and of one-half of the stock and all the bonds of the Des Moines Northwestern Company. It was also the lessee in perpetuity of the roads of these two companies. The result was that these two roads were sub-



stantially Wabash properties and they were in fact so treated by the Wabash Company. It is also well to keep in mind that General Dodge advanced all the money to build the St. Louis, Des Moines & Northern line, and a considerable part of the money to acquire the terminal property. As we have heretofore stated, the Wabash, St. Louis & Pacific Railway Company became insolvent and its property placed in the hands of a receiver about 1884, in a proceeding to foreclose a general mortgage given by that company. In the process of this foreclosure preceding a purchasing committee composed of James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, and representing the bondholders of the Wabash Company, was organized, who acquired title by foreclosure sale to all of the property of the Wabash Company, including the interest of that company in the Des Moines & St. Louis and the Des Moines Northwestern companies in the early part of 1886. (See deed Mercantile Trust Company to Purchasing Committee, Vol. II, pp. 706-8, and deed Wabash, St. Louis & Pacific Railway Company to Purchasing Committee, Vol. II, pp. 536-42.)

This Purchasing Committee as alleged in the amended bill of complaint had power under the agreement creating it to purchase and hold all of the mortgaged property . . . "It being provided in said agreement that said Purchasing Committee might, after the foreclosure of said mortgaged properties, dispose of the same in such manner as they might deem to be for the best interests of the holders and owners of said bonds, or organize or cause to be organized new corporations to take title to and operate said railroad properties for the use and benefit of said bondholders." (Rec., Vol. I, pp. 63 and 64.)

On October 9, 1886, the firm of Polk & Hubbell of Des Moines entered into a written contract with the Purchasing Committee (Vol. IV, pp. 1573-4), by which the latter agreed to secure title to the railroad of the Des Moines Northwestern Railway Company by foreclosure of the trust deed thereon, and sell the same, including "a one-fourth interest in the terminal property at Des Moines," to Polk & Hubbell for \$450,000.00, the same to be paid in first mortgage bonds secured by a mortgage on that part of the "railway lying between Farnham Street" (the western limits of the terminal property) "and the Town of Fonda." This agreement was ratified by the directors of the Wabash Company (Ex. 264, Vol. IV, pp. 1574-5).

On September 10, 1887, the Purchasing Committee and Polk & Hubbell entered into a supplemental agreement with respect to this (Vol. IV, pp. 1575-6). One of the purposes of this supplemental contract was to provide that Polk & Hubbell should further secure the \$450,000.00 to be paid to the Purchasing Committee, by giving them a lien upon the one-fourth interest in the terminal property. This provision in the contract reads as follows (p. 1576):

"Simultaneously with the conveyance above mentioned of one-fourth interest in the terminal property at Des Moines, the same shall be mortgaged back to the purchasing committee for the further security of the said \$450,000. In case, however, the terminal property at Des Moines shall be merged in a terminal company either before or after the transfer of one-fourth interest as above, *the bonds and stock received from the Terminal Company in exchange for said one-fourth interest shall be transferred in lieu of the property* to Messrs. Polk & Hubbell, or their assignees."

By the terms of this contract the purchasing committee retained the option of doing either one of two things in carrying out the contract by which they agreed to transfer to Polk & Hubbell "a one-fourth interest in the terminal property at Des Moines;" either,

First. Transfer to Polk & Hubbell a one-fourth interest in the terminal property itself; or

Second. In the event "the terminal property at Des Moines shall be merged in a terminal company either before or after the transfer of one-fourth interest as above," to transfer to Polk & Hubbell "the bonds and stock received from the Terminal Company in exchange for said one-fourth interest \* \* \* *in lieu of the property.*"

Now it is perfectly clear that a transfer of the stock and bonds of the Terminal Company could not be "in lieu of the property" unless the Terminal Company acquired a good title to the property. This contract was made September 10, 1887, less than two months prior to the time we find Colonel Blodgett in St. Louis preparing the mortgage of the Terminal Company reciting the fact that the Terminal Company has acquired and owns the terminal property. It shows clearly what was in the minds of the parties as to the disposition of the title and ownership of the terminal property. They were looking forward to transferring the title and ownership to the Terminal Company.

In carrying out this contract there was a delivery of one-fourth of the stock and bonds of the defendant company "in lieu of" one-fourth of the terminal property (testimony of F. M. Hubbell, Vol. III, pp. 1007-9).

On February 5, 1890, F. M. Hubbell contracted to purchase of the "purchasing committee" certain bonds and a one-fourth interest in the capital stock of the Des

Moines Union Railway Company (Ex. 297, Vol. IV, p. 1599). Immediately following the making of this contract it was agreed between Mr. Hubbell and General Dodge that the latter should participate in the purchase of the stock and bonds (testimony of F. M. Hubbell, Vol. III, pp. 1009-10). This was followed by making separate contracts with the purchasing committee (testimony of F. M. Hubbell last above referred to, and Exs. 298-300, Vol. IV, pp. 1600-2). This sale of stock was ratified at a meeting of the board of directors of the Des Moines & St. Louis Railroad Company, held April 8, 1890 (Ex. 185, Vol. IV, p. 1434). The purchasing committee accounted to the complainant, the Wabash Railroad Company, for the money paid by Hubbell and Dodge for this stock (Vol. IV, p. 1543, at top of page, and Ex. 244, Vol. IV, p. 1558). Now, what did the purchasing committee, the Wabash Company and the Des Moines & St. Louis Company intend to sell Messrs. Hubbell and Dodge when they took and retained their money for stock in the defendant company? Did they intend thereby to transfer to them a valuable interest in the terminal property, or were they simply intending to transfer some nicely lithographed paper which didn't represent anything? The natural inference is that they intended to transfer something of value, and if they had any other intention they did not advise Hubbell or Dodge of it. Did they act intelligently? The purchasing committee owned and had for years owned and managed the Wabash property. The persons present at the meeting of the directors of the Des Moines & St. Louis Company which ratified the sale of this stock were James F. How, vice-president of the Wabash Company; C. M. Hays, general manager of the Wabash Company;

A. B. Cummins, local attorney for the Wabash Company; F. M. Hubbell, H. S. Priest, general attorney for the Wabash Company, and George S. Grover, assistant general attorney for the Wabash Company (Vol. III, pp. 1011-12). Certainly these people knew what was intended by the transaction which culminated in the transfer of the terminal property to the defendant company.

Again on June 5, 1890, Mr. Hubbell made a contract with the purchasing committee by which he bought \$50,000.00 of the Des Moines Union bonds and 500 shares of Des Moines Union stock for \$57,736.00 (Vol. IV, p. 1613). The bonds at this time were worth about ninety cents on the dollar (Ex. 248, Vol. IV, p. 1561). This sale of stock was ratified by a resolution of the board of directors of the Des Moines & St. Louis Company on February 11, 1891 (Ex. 187, Vol. IV, p. 1437). The money paid for these bonds and this stock came into the hands of the purchasing committee (Vol. IV, p. 1560), and the committee accounted to the complainant, the Wabash Company, for the same (Vol. IV, p. 1543).

Does it now lie in the mouth of the Wabash Company to say that this stock was not intended to represent any valuable interest in the terminal property, when its predecessor, the purchasing committee, sold it to Hubbell for a valuable consideration, which consideration passed to the Wabash Company which now retains it? It can only represent a valuable interest in the terminal property if the Terminus Company acquired a good title to the property.

In this connection see the letter of O. D. Ashley, president of the Wabash Company, and one of the purchasing committee, to Mr. Hubbell, of April 5, 1890

(Vol. IV, pp. 1602-3), in which, speaking of the proposed sale of this second 500 shares of stock in the defendant company, which it will be remembered left in the hands of the purchasing committee one-eighth of such capital stock, Mr. Ashley says:

“It must be understood, of course, that a one-eighth interest in the capital stock shall be sufficient to represent a proprietorship in the company according to the understanding we had when you were here.”

The capital stock could not represent a proprietorship unless the corporation owned the property.

On January 15, 1892, all the capital stock of the defendant company held by the Des Moines & Northwestern, the Des Moines & Northern, F. M. Hubbell, and General Dodge, aggregating 3,500 shares (except a few shares standing in the name of the directors), was transferred to the Des Moines, Northern & Western Railway Company (Vol. II, p. 711), a consolidation of the Des Moines & Northern and the Des Moines & Northwestern companies.

On October 4, 1893, the Des Moines, Northern & Western Railway Company pledged 2,500 of these shares of stock in the Des Moines Union Company to F. M. Hubbell & Son to secure certain indebtedness to that firm (Vol. IV, pp. 1480-1), and on January 29, 1894, it sold this same stock to F. M. Hubbell & Son in satisfaction of certain indebtedness (Vol. IV, pp. 1482-3). At this last meeting there were present the following stockholders of the Des Moines, Northern & Western Railway Company: F. M. Hubbell, L. M. Martin, A. B. Cummins, A. N. Denman and H. D. Thompson, who constituted all the stockholders of that

company except General Dodge, who held 5,000 shares; W. R. Warfield, who held 50 shares, and F. C. Hubbell, who held one share. F. C. Hubbell is a defendant in this suit and is not complaining; W. R. Warfield has never complained, and General Dodge was told of this sale within a few days thereafter and ratified it (Vol. III, pp. 1017-8). This stock was transferred on the books of the defendant company to F. M. Hubbell & Son on October 4, 1893, and has ever since stood in that name.

The first interest, either direct or indirect, which the complainant, the Chicago, Milwaukee & St. Paul Railway Company, acquired in the Des Moines, Northern & Western Railway Company was by virtue of the two contracts of March 15, 1894 (Ex. 80, Vol. II, p. 838; Vol. IV, p. 1618), which were not, however, executed until several months after that date and to which we will make more extended reference in another division of our argument. Prior to this the Chicago, Milwaukee & St. Paul was advised in writing that the Des Moines, Northern & Western Company owned only 1,000 shares of stock in the defendant company and that five-eighths of the stock was owned by individuals (Vol. IV, p. 1617).

The letter is as follows:

“February 22, '94.

Mr. Roswell Miller, President,

Chicago, Milwaukee & St. Paul Railway Company, Chicago, Ill.

Dear Sir:—

Your favor of the 20th is received and noted. Enclosed I send you a copy of the Articles of Consolidation and Incorporation and Trust Mortgage of the Des Moines, Northern & Western Railway

Company. There has been bonds issued on this property to the amount of \$2,770,000. I have no printed copy of the articles of incorporation of the Des Moines Union Railway Company, but will say they were drawn by our attorney, Mr. A. B. Cummins, and I think are all right, and if important to you, can have a copy made and sent you. The amount of bonds authorized by that corporation is \$800,000, bearing 5 per cent interest, of which amount \$612,000 have been issued. I enclose plat of Des Moines Union. We have about five miles of right of way occupied by about twenty miles of track. *The Des Moines, Northern & Western Railway Company own one-fourth of the capital stock of the Des Moines Union Railway Company. The Wabash owns one-eighth and five-eighths is owned by individuals.*

If you desire any further information I shall be glad to furnish it.

Yours truly,

(Signed) F. M. Hubbell

President

It therefore appears without controversy that the defendant company issued in payment for this property \$400,000.00 of its fully paid capital stock, all of which went to the predecessors of the complainants; that their predecessors sold five-eighths of this stock for money, upon the theory that it represented a valuable interest in the property, and that this money is still retained by complainants. So far as the predecessors of the Wabash were concerned, they were either honest or dishonest. If they were honest, they intended that Hubbell and Dodge, when they bought this stock, should get something for their money, which intention necessarily involves the thought that the Terminal Company held a good title to the property. If they



were dishonest, their successors have received the money and have no standing in this Court. We prefer to think they were honest, and there is nothing in the record to lead us to think otherwise.

So far as the Chicago, Milwaukee & St. Paul Company is concerned, their predecessors thought they were parting with something of value when they disposed of this stock, and that company acquired its interest with full understanding of the situation.

At the end of this argument will be found two diagrams—one showing the various changes in the ownership of the capital stock, and one showing the transfers of the capital stock.

It will no doubt be said, as it has been, that there was a great disparity between the value of this stock and the price paid for it. Nothing could be further from the fact at the time. The three railway enterprises had culminated in disaster, as indicated by the multiplicity of foreclosure shown by the record. They could none of them pay the interest on their bonded debt. Take, for example, the Des Moines Northwestern. It had a narrow gauge line from Des Moines to Fonda, a distance of about 113 miles, and it had a one-fourth interest in the Des Moines terminal property. The line of railroad, not the terminal interest, was mortgaged to secure \$800,000.00 of general Wabash bonds. So early as 1887 it was in arrears for interest upon this debt in the sum of \$300,000.00, showing that it had never paid a penny of return on the investment. The Wabash virtually owned this property, but it was a burden and not a benefit. The purchasing committee made an agreement with Polk and Hubbell which came to this: the railroad was to be cleared by foreclosure proceedings of all its old bur-

dens and turned over to them, together with one-fourth interest in the terminal property, or the equivalent in stocks and bonds of the Terminal Company if one was formed. Polk and Hubbell were to pay for this by bonding the railroad for \$450,000.00 and turning over the bonds to the purchasing committee. They were not to incur any personal liability. In other words, the bonded debt and interest was scaled down more than 54 per cent, and then with the terminal interest given to Polk and Hubbell. Nor was this all. A little later the bonded debt was scaled down to \$400,000.00, which F. M. Hubbell agreed personally to pay, as follows: \$112,000.00 in terminal bonds, which he had gotten in the purchase, and the remainder in his individual notes, so that he got the railroad and one-fourth of the stock of the Terminal Company for \$288,000.00.

A Terminal Company serving three railroads of this kind as its principal business, and bound to render that service at cost was not a very promising institution. The only chance for value in its stock in view of the contract of 1889 was in what are called "surplus earnings," as to which we will speak presently.

General Dodge was identified with railroad construction and operation all his life, and so was optimistic with respect to such enterprises and capable of appreciating their value. And he was interested in these Des Moines roads from the beginning. What did he think of this terminal stock? In 1894, after the Hubbells had acquired the stock, they now hold from the Des Moines, Northern & Western Railroad Company, a large block of whose shares the General held. Mr. Hubbell met him and showed him the record of the transaction and told him "that Hubbell & Son had bought this (terminal) stock of the company, and he expressed

himself satisfied." And Mr. Hubbell offered to let him have an interest in the stock with him, but he said he did not want it. "He said he thought it would be valuable at some time, but he did not want to invest in it." (Rec., Vol. III, p. 1018.)

The "surplus earnings" were revenues derived from the rent of property not immediately required for railroad uses, and payments for switching services rendered, not under contract, for other outside railroad companies and for transportation over the terminal lines. At the beginning they were insignificant and negligible.

There was no issue as to these which called for a full and detailed showing, but there is enough in the record to show substantially what they were. We submit what is shown, omitting cents.

December, 1889	\$151.	Rec., Vol. II, p. 273.
January, 1890	160.	" " " " 273.
February, 1890	168.	" " " " 274

During this month Hubbell made his first purchase of stock.

May, 1890	\$218.	Rec., Vol. II, p. 276.
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Hubbell now made his second purchase.

December, 1890	\$200.	Rec., Vol. II, p. 278.
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For the eleven months from January 1, 1891, to December 1st of that year, \$3,763 (Rec., p. 281), or on the principle of average \$4,116 for the entire year, or at the rate of about 1 per cent on the issued stock.

There is no showing for the period from December 1, 1891, to January 1, 1898. For the years following,

until controversy arose between the parties, the figures are as follows:

1898	\$10,825.	Rec., Vol. IV, p.	1371.
1899	17,211.	" " " "	1371.
1900	21,333.	" " " "	1384.
1901	25,643.	" " " "	1385.
1902	29,922.	" " " "	1386.
1903	35,570.	" " " "	1387.
1904	46,752.	" " " "	1388.
1905	54,763.	" " " "	1389.
1906	61,081.	" " " "	1397.
1907	75,513.	" " " "	1406.

Not one dollar of these earnings was distributed as dividends. The money, \$200,000.00, explicitly shown, and the revenues for eight years not so shown, was applied to improvements of and additions to the property, the remainder \$176,715.00 appearing and being carried as "surplus earnings" at the time the evidence closes.

The evidence shows conclusively that these surplus earnings, insignificant at first, increased after the Hubbells acquired their stock, slowly at the beginning and more rapidly later as the terminal properties were improved and expanded, and as the City of Des Moines grew and the volume of its business increased, and during this period of eighteen years, covered by the evidence, the enterprise was in the charge of the Hubbells, the father as secretary and the son as president, the father giving much of his time, and the son most of his to their official duties, and this without salaries, and with no other compensation than would in the future come to them as to the other stockholders from the increased welfare and prosperity of the enterprise in which they were embarked.

When the Wabash purchasing committee sold this stock its value was problematical and entirely speculative. If the future was as the past it was worth nothing. They preferred the price for which they sold at the time. Now that the future has justified the faith of the Hubbells, they want to regain the property ~~they sold and to retain the price for which they~~ sold it.

Ever since May 1, 1888, the terminal property has been treated by everybody as the absolute property of the defendant company.

The defendant company took possession of the property on May 1, 1888, and has ever since possessed and operated it.

The corporate action of the defendant company from the time of its organization to January 8, 1900, in as far as it does not appear in complainants' testimony, appears in defendants' exhibits, volume IV, pages 1297 to 1413. We do not intend at this time to refer to it in detail. Its examination will disclose the undisputed fact that at all times the defendant treated this property as its own. It bought the original terminal property and paid for it. It acquired other property, took the title in its own name in fee simple; improved the property on its own motion and according to its own ideas, and paid for it with its own money. It elected its own directors and its own officers, made its own contracts, and in every way conducted its own business. At no time did the defendant do a single act recognizing any rights of the complainants or their predecessors in the property, except the rights which they possessed by reason of their stock interest. In examining this record, bear in mind that at all times there was on the board of directors of the defendant

company one or more persons representing the stock of the complainant, the Wabash Company or its predecessors, and two or more directors representing the stock interests of the complainant, the Chicago, Milwaukee & St. Paul Railway Company, or its predecessors.

**But the interesting question is, how has this property been treated by the complainants and their predecessors since May 1, 1888?**

First, as to the Wabash Company (and in considering this it is interesting to note how this property was treated by the Wabash Company before and after May 1, 1888, and to note what, if any, change is apparent in its relation to the property at that date):

At a meeting of the executive committee of the Wabash Company, held December 26, 1882 (Ex. 227, Vol. IV, p. 1529), a resolution was passed authorizing the transfer to the Mercantile Trust Company of New York of certain property to secure certain indebtedness, and among the property scheduled is "Real Estate in Des Moines, \$300,000."

At a meeting of the purchasing committee, held August 6, 1886 (Ex. 240, Vol. IV, p. 1555), the terminal property in Des Moines is referred to as follows:

"And the sale to include only one-quarter of the terminal property formerly owned by the Wabash Railway Company and General Dodge; this sale leaving the purchasing committee or the new Wabash Company in possession and ownership of one-half of said terminal property."

We have already shown how Polk & Hubbell in October, 1886, made a contract with the purchasing commit-

tee to purchase the property of the Des Moines Northwestern Company and "a one-fourth interest in the terminal property at Des Moines" (Ex. 263, Vol. IV, p. 1573), and how in a supplemental contract the purchasing committee had secured the option of delivering "in lieu of" the property, one-fourth of the stock and bonds of the terminal company.

Under date of February 25, 1888, Mr. Charles M. Hays, general manager of the Wabash Western Railway Company, made his annual report, which was embodied in the annual report presented to the stockholders on March 13, 1888, as follows (Ex. 229, Vol. IV, p. 1532):

"There has also been erected during the year an addition of fifteen stalls to roundhouse at Moberly at a cost of—\$15,625.79  
Fifteen-stall roundhouse at Des Moines, Iowa (which will be conveyed, with other property at that point, to the Des Moines Union Railway Co.)—\$12,472.96"

Thus it appears that prior to the execution and delivery of the deeds to the Terminal Company, the terminal property is referred to and treated by the parties as property of the Wabash Company, although the title to most of it stood in the name of trustees.

A very different attitude is shown on the part of this complainant and its predecessors in relation to this property after May 1, 1888.

On March 5, 1889, Mr. How writes to F. M. Hubbell (Ex. 290, Vol. IV, p. 1595) as follows:

"I am in receipt of your letter of Mar. 2nd. As the property referred to in your letter *now* be-

*longs to the Des Moines Union Ry. Co., I think that Co. should pay the interest on the mortgage and will also arrange to take care of the principal. The last payment of interest was made in the month of Jan'y, 1886."*

Again on April 1, 1889, he writes (Ex. 292, Vol. IV, p. 1596):

"I have just returned from the East and am in receipt of your letter of the 23d ult. I think that the interest due on the deed of trust on the lot *owned* by the Terminal Co. referred to in your letter should be paid and an arrangement made to continue the deed of trust on the property at a lower rate of interest. Of course the interest now due and to become due should be paid by the Terminal Co."

Again he writes to Polk & Hubbell under date June 28, 1889 (Ex. 294, Vol. IV, p. 1597):

"I am in receipt of yours of June 26th calling attention to certain bills for delinquent taxes on railroad property in Des Moines. Any such bills that are a lien on the property transferred to the Des Moines Union Ry. Co. should be paid by that Co., *all the property having been bought for that Co. and since been transferred to it.*

I am also in receipt of a letter from Mr. Hubbell of same date referring to your letter and speaking of a similar tax certificate held by him on the same property. Will you please show this letter to him."

These letters were written very shortly after the transfer of the property, and were written by James F. How, who had been the moving spirit in this matter during all the years since 1881, who knew the in-



tent of the transaction, and he seems to have no doubt as to who owned this property.

We have already shown the facts in relation to the amendments to the articles of incorporation of the defendant company of April 8, 1890, and the resolutions passed that day with respect to the title to this property and the payment of the purchase price therefor by the defendant company, and the part which was taken in the same by James F. How, vice-president; Charles M. Hays, general manager, and Wells H. Blodgett, general counsel of the Wabash Company, all of whom were familiar with the transaction, were active in promoting the terminal organization, and knew what was intended.

Again on May 20, 1890, Mr. How wrote Mr. Hubbell as follows (Ex. 304, Vol. IV, p. 1612):

*"I am just in receipt of yours of the 17th, giving list of certain property that you have purchased in Des Moines, which you offer to sell to the Des Moines Union Railway Company at the price you paid for same, with interest from the date of purchase, said offer to be accepted at any time within thirty days of the date of your letter. As I understand it, this question will have to be acted upon by the board of directors of the Des Moines Union Railway Company, and I suppose your letter is written with the idea of ascertaining how Mr. Hays and myself would vote on the question at such a meeting. It is our opinion that your offer should be accepted, provided the Des Moines Union Railway Company can pay for the property in their bonds at par, with accrued interest."*

This doesn't sound as though Mr. How had in mind that the ownership of this property was in the complainants or their predecessors.

On June 6, 1890, General Dodge wrote Mr. Hubbell as follows (Ex. 305a, Vol. IV, p. 1614):

"I duly received yours of May 17th in re. property you have bought at Des Moines. I would like to have you send me a map showing this property. I think the Des Moines Union Railway Co. should take it as soon as they can raise the money to do so on their bonds."

Note the letters of Charles M. Hays to Mr. Hubbell, dated April 28, 1892, and April 22, 1893 (Exs. 306-7, Vol. IV, pp. 1616-7), in the latter of which he says:

"While it seems to me that it is desirable that the lot should be owned by the Des Moines Union Company, we are not in such position that we feel we can conveniently advance the amount that would be chargeable to us on usual basis for distributing the expense of such purchase. *I think since you are now the largest holder in Des Moines Union bonds and stock, you should sell the lot to the company and take bonds at par for same.* As a director of the Des Moines Union Company I am willing to approve getting lot in this way, but I am not willing to approve of it on basis of each company contributing its proportion of the purchase price and taking bonds therefor."

If the Hubbell stock-holding interest was intended to be of no value to him, why should he sell the lot to the company and take its bonds therefor?

There will be found among defendants' exhibits voluminous correspondence passing between the defend-

ant company and the Wabash Company and its predecessors, covering the period from May 1, 1888, to the time of the commencement of this suit. It would unnecessarily extend this argument to refer to this correspondence in detail. With respect to it we desire to say that there isn't a single letter passing between the parties in this period of twenty-three years which does not either tacitly or expressly recognize the absolute ownership of the defendant company, and no intimation at any time that the Wabash Railroad Company or its predecessors claimed any interest in the property whatever, except that to which it was entitled by reason of its being the owner of some of the defendant's shares of stock. We will content ourselves with here calling attention to a few of the more solemn and formal acts of the Wabash Company and its predecessors, which show conclusively that no claim was made to any interest in this property other than the stock-holding interest.

#### **CORPORATE ACTS OF WABASH COMPANY.**

At a meeting of the board of directors of the Des Moines & St. Louis Railroad Company held in New York on March 16, 1899, there were present the following persons: O. D. Ashley, Edgar T. Welles, Cyrus J. Lawrence, Thomas H. Hubbard and J. C. Otteson. Ashley, it will be remembered, was president of the Wabash Company, and he with Edgar T. Welles and Thomas H. Hubbard had been three of the members of the purchasing committee. Otteson was secretary of the Wabash Company. These persons were familiar with the history of the terminal property and the intention of the parties with respect thereto. At this

meeting (see Ex. 192, Vol. IV, pp. 1446-9), a resolution was passed authorizing the execution of a deed from the Des Moines & St. Louis Railroad Company to the complainant, the Wabash Company, of the property of the former company, which was described in the resolution and in the deed so authorized as follows (pp. 1448-9) :

“commencing at a point in or near the City of Des Moines, where said road connects with the tracks of the Des Moines Union Railway Company, and extending from thence in a southeasterly direction through the counties of Polk, Marion and Monroe to the town or City of Albia, in Monroe County, a distance of about sixty-seven miles, \* \* \* and especially including all the rights and leasehold and other interests of the first party under a contract dated May 10, 1889, between the Des Moines Union Railway Company of the first part and the Des Moines & St. Louis Railroad Company, the Des Moines & Northwestern Railway Company, and the St. Louis, Des Moines & Northern Railway Company, of the second part.”

According to the complainants' theory, the Des Moines & St. Louis Railroad Company owned a one-half interest in the terminal property, but it will be noted that this deed does not purport nor attempt to convey any interest in the terminal property whatever, except the interest it had under the lease of May 10, 1889, and in describing its railroad property it describes it as commencing at the point where its tracks connect with the tracks of the Des Moines Union Railway Company.

On January 1, 1899, the Wabash Railroad Company gave a mortgage to the Central Trust Company of

New York (Ex. 530, Vol. IV, p. 1928). This mortgage was prepared by Colonel Blodgett (testimony of Colonel Blodgett, Vol. II, p. 379), who had been the guiding spirit in the terminal transaction and was fully familiar with the situation. This mortgage covered what is known as the Des Moines division, the northerly terminus of which is at Des Moines. Among the recitations in the mortgage is the following:

"And, whereas, the company owns the entire capital stock of the Des Moines & St. Louis Railroad Company, consisting of twenty thousand (20,000) shares of the par value of one hundred (\$100) dollars each, *and five hundred (500) shares of the capital stock of the Des Moines Union Railway Company of the par value of one hundred (\$100) dollars each.*"

The property is described in the mortgage as follows (p. 1929):

"commencing at a point in or near the City of Des Moines, where said road connects with the tracks of the Des Moines Union Railway Company, and extending from thence in a southeasterly direction through the counties of Polk, Marion and Monroe to the town or City of Albia, in said County of Monroe, a distance of about sixty-seven miles;  
\* \* \* *also five hundred (500) shares of the capital stock of the Des Moines Union Railway Company, of the par value of one hundred (100) dollars each; \* \* \* and also all the leasehold rights and privileges of the company to use and enjoyment of the tracks, stations and terminal properties of the Des Moines Union Railway Company in or near said City of Des Moines, including also the rights and interests of the company in and to a certain terminal contract, dated the 31st day of July, 1897, and made by and between the Des*

Moines Union Railway Company, the company and the Des Moines Northern & Western Railroad Company, and in and to another contract, dated the 10th day of May, 1889, and made by and between the Des Moines Union Railway Company, the Des Moines & St. Louis Railway Company, the Des Moines & Northwestern Railway Company, and the St. Louis, Des Moines & Northern Railway Company."

The mortgage further provides :

"The company agrees at the time of the execution of these presents to deliver to and deposit with the trustee the above-mentioned terminal contract, dated the 31st day of July, 1897, \* \* \* and also the other above-mentioned contract, dated the 10th day of May, 1889, \* \* \* together with an assignment or assignments by the company to the trustee of all its rights and interest in and to said contracts, and the consents to such assignment or assignments of the remaining above-mentioned parties to said contracts or of their successors or assigns.

\* \* \* \* \*

And the company further agrees at the time of the execution of these presents to deliver to, and deposit with, or cause to be delivered to, and deposited with the trustee, duly endorsed in blank, the above-mentioned shares of stock of the \* \* \* Des Moines Union Railway Company, \* \* \* and also a consent to the assignment or mortgage by these presents to the trustee of the above-mentioned shares of stock of the Des Moines Union Railway Company, which consent is to be given by the above-mentioned Des Moines Northern & Western Railroad Company, party to the above-mentioned terminal contract of the 31st day of July, 1897, or its successors or assigns."

It will be noted that this mortgage does not purport to cover any interest in the terminal property itself. It describes the complainants' property as commencing at a point at or near the eastern limits of the City of Des Moines, where it connects with the tracks of the Des Moines Union Railway Company, and then for the purpose of transferring to the mortgagee whatever rights it has with respect to the Des Moines Union Company or its property, it specifically and with great care provides for a transfer of the 500 shares of the capital stock in that company and the contracts by which it is entitled to be furnished terminal service by the defendant company for the period of thirty years from and after May 1, 1888. The man who drew this mortgage, and the parties who executed it, never suspected that the complainant had any interest in this terminal property except the interest represented by its share of the capital stock and its interest as a lessee or tenant under the terms of the operating contract.

The things we have called attention to are only a very few of the very many things appearing in this record which show that at no time between May 1, 1888, and the commencement of this suit did the Wabash Company, or any of its predecessors, or any of its officers, have the least suspicion that that company had any interest in the property in controversy other than its interest as a stockholder, or that the shares of stock held by the defendant, F. M. Hubbell & Son, were "merely nominal and of nominal value."

**THE RELATION OF THE CHICAGO, MILWAUKEE  
& ST. PAUL RAILWAY COMPANY AND ITS  
PREDECESSORS TO THE TERMINAL  
PROPERTY.**

Going now to the history of the relations sustained by the complainant, the Chicago, Milwaukee & St. Paul Railway Company, and its predecessors, to the terminal property since May 1, 1888.

It will be remembered that the Des Moines Northwestern Railway Company in February, 1881, gave a mortgage to the Central Trust Company (Vol. II, p. 605) to secure certain general mortgage bonds of the Wabash Company.

It will also be remembered that in 1886 Polk & Hubbell made a contract and supplement thereto with the purchasing committee by which the committee undertook to foreclose the Des Moines Northwestern mortgage, acquire title to the property of that company, and sell the same, together with a one-fourth interest in the terminal property, or "in lieu thereof," one-fourth of the stock and bonds of the terminal company.

In pursuance of that contract, the purchasing committee caused the Central Trust Company to bring a suit in the District Court of the United States for the southern district of Iowa to foreclose that mortgage. The decree in the case appears in complainants' testimony (Vol. II, pp. 609-13). The decree describes the property as "being a line of railway extending from Farnham street, Des Moines, Iowa, through the counties of Polk, Dallas," etc. (p. 610). The deed to Polk & Hubbell executed in pursuance of the sale under that decree (Vol. II, pp. 613-5) describes the property (p. 614) as "being a line of railway extending from Farn-



ham street, Des Moines, Iowa, through the counties of Polk, Dallas," etc.

Farnham street was the western terminus of the terminal property, and this line of road extended westerly from that street. It will be seen that the Des Moines & Northwestern Railway Company, by virtue of this decree and these deeds, acquired title simply to the railway property commencing at Farnham street, the westerly limit of the terminal property.

On April 8, 1890, when the capital stock of the defendant company was issued, one-fourth thereof (1,000 shares, less two shares standing in the name of the two directors representing that company) was issued to the Des Moines & Northwestern Railway Company (Vol. II, p. 711), and thereby the Des Moines & Northwestern Railway Company acquired the only interest it had in the terminal property outside of the interest which it had as a tenant under the contract of May 10, 1889.

It will be remembered that the St. Louis, Des Moines & Northern Railway Company, which owned the line from Des Moines to Boone, on August 1, 1881, gave a mortgage to the Mercantile Trust Company (Vol. II, p. 552), which described the property (p. 554) as

"all its railroad extending as aforesaid, from the western boundary line of the City of Des Moines, in Polk County, Iowa, by way of Clive in said county, through the counties of Polk, Dallas and Boone," etc.

The western boundary line of the City of Des Moines was almost a mile west of Farnham street, the western boundary line being what is now known as Twenty-eighth street, and Farnham street being now known

as Sixteenth street. This left a piece of road extending from Farnham street to West Twenty-eighth street which was not covered by this mortgage, nor did the mortgage purport to cover any interest which the St. Louis, Des Moines & Northern Company had in the terminal property. For the purpose of extending the lien of this mortgage to cover the omitted property, the St. Louis, Des Moines & Northern Railway Company executed a supplemental mortgage to the Mercantile Trust Company (Vol. II, pp. 561-3), which after reciting the execution of the original mortgage says:

"Whereas, there was omitted from the description of the property conveyed by said mortgage a part of the road of the party of the first part which should have been included, and

Whereas, the board of directors of the party of the first part has this day authorized its president, and assistant secretary, to execute and deliver a supplement to said mortgage so that said omitted property shall be included in said mortgage.

Now, therefore, the St. Louis, Des Moines & Northern Railway Company, by this indenture doth grant, bargain, sell and convey unto the Mercantile Trust Company, as trustee, and to its successor or successors in trust, all that portion of its line of railroad lying between Farnham street, in the City of Des Moines, and the western corporate limits of said city, being situated in the County of Polk and State of Iowa, together with all the appurtenances thereto belonging or therein included, and also all its interest of whatever kind in the obligation or stock of the Des Moines Union Railway Company, and all its property of whatever name or nature not included and covered by said original mortgage."

It will be noted that by this supplemental mortgage the only interest which is attempted to be transferred in the terminal property is the obligation or stock of the defendant company.

This mortgage was foreclosed by an action in the District Court of the United States for the southern district of Iowa, the bill of complaint therein appearing in complainants' testimony (commencing on page 563, Vol. II), and which bill of complaint, referring to this supplemental mortgage, describes the interest in the terminal property thereby conveyed as being the obligations or stock of the terminal company (p. 565). The decree in the case, which appears in complainants' testimony (commencing at page 578, volume II), describes the property in the same way. The deed executed to Solon Humphreys and J. T. Granger in pursuance of the decree describes the property in the same way (Vol. II, pp. 584, 590).

In November, 1889, articles of incorporation of the Des Moines & Northern Railway Company were adopted (Vol. II, pp. 592-6). On November 23, 1889, Solon Humphreys and others, who had purchased this property at the foreclosure sale, deeded it to the Des Moines & Northern Railway Company (Vol. II, pp. 596-7), the deed describing the property as follows:

“ \* \* \* The line of railway and franchises (except the franchise to be a corporation) formerly belonging to the St. Louis, Des Moines & Northern Railway Company, extending from Farnham street in the City of Des Moines, County of Polk and State of Iowa, through the Town of Clive and the counties of Polk, Dallas and Boone to the City of Boone \* \* \* and all its interest in the stock of the Des Moines Union Railway Company.”

On April 8, 1890, when the defendant company's certificate of shares were issued, 1,000 shares (less two shares issued to the directors of the defendant company) were issued to the Des Moines & Northern Railway Company.

At a meeting of the stockholders of the Des Moines & Northwestern Railway Company, held October 12, 1891 (Ex. 129, Vol. IV, p. 1456), a lengthy resolution was adopted looking to the consolidation of the properties of the Des Moines & Northwestern and the Des Moines & Northern companies. In examining this resolution it is interesting to note that wherever the properties of these two companies are referred to they are described as commencing at Farnham street, in the City of Des Moines, and extending in a westerly and northwesterly direction, and wherever their interest in the terminal property is concerned it is referred to as "shares of stock" of the defendant company. References are made to these matters in the following paragraphs of the resolution and the contract which is made a part of it: third (p. 1459), fourth and fifth (p. 1460), ninth, tenth and eleventh (p. 1461), fifteenth (p. 1463), and fourth paragraph of contract (pp. 1468-9). Nowhere in this resolution is any reference made to any claim on the part of these companies that they owned any interest in the terminal property itself.

Carrying out this resolution, articles of consolidation and incorporation of the Des Moines, Northern & Western Railway Company were adopted on the 14th of December, 1891 (Ex. 64, Vol. II, p. 624). By the terms of the second article (pp. 625-6) the property of the two constituent companies, the Des Moines & Northern Company and the Des Moines & Northwestern Company, became the property of the Des Moines, North-

ern & Western Railway Company, the consolidated corporation.

The objects of the new corporation were stated in part as follows (p. 626-7):

"(1) To own, complete, extend, improve, maintain, and operate the line of railway heretofore owned and operated by the Des Moines & Northwestern Railway Company, extending from Farnham street, in the City of Des Moines, Polk County, Iowa, through the counties of Polk, Dallas, Guthrie, Greene, Calhoun and Pocahontas to Fonda, in said last-named county.

(2) To own, complete, extend, improve, maintain and operate the line of railway heretofore owned and operated by the Des Moines & Northern Railway Company, extending from Farnham street, in the City of Des Moines, Polk County, Iowa, through the counties of Polk, Dallas and Boone, to the City of Boone, in said last-named county.

. . . . .

(10) *To purchase, own and sell capital stock of the Des Moines Union Railway Company, or any other company owning or operating terminal grounds, tracks or stations."*

As we have already shown, upon the organization of this company, all the capital stock of the defendant company theretofore owned by the Des Moines & Northwestern Company, the Des Moines & Northern Company, by G. M. Dodge and by F. M. Hubbell, aggregating 3,500 shares, were transferred to and became the property of the Des Moines Northern & Western Railway Company.

On December 14, 1891, at a meeting of the stockholders of the Des Moines, Northern & Western Railway Company (Ex. 208, Vol. IV, p. 1476), a resolution was passed authorizing the giving of a mortgage to the Metropolitan Trust Company of New York. A part of that resolution is as follows (pp. 1477-8) :

“Be it therefore resolved; that the Des Moines, Northern & Western Railway Company, the consolidated corporation hereinbefore referred to, shall duly execute and acknowledge a trust mortgage to the Metropolitan Trust Company of the City of New York, as trustee, which mortgage shall convey, under the usual terms and conditions, all its railroad extending from Farnham street, in the City of Des Moines, County of Polk, and State of Iowa, through the counties of Polk, Dallas, Guthrie, Greene, Calhoun, and Pocahontas, Iowa, to Fonda, in said last-named county, and also extending from Farnham street aforesaid over the same line to Clive, in the County of Polk, and thence through the counties of Polk, Dallas and Boone, Iowa, to the City of Boone \* \* \* *also a one-fourth interest in the capital stock of the Des Moines Union Railway Company; but it is expressly understood and agreed that said mortgage shall not convey an additional five-eighths interest in the capital stock of the said Des Moines Union Railway Company, of which the said company is the owner.*”

In pursuance of this resolution, the Des Moines, Northern & Western Railway Company on the 15th day of December, 1891, executed a mortgage to the Metropolitan Trust Company of New York, which appears as exhibit 65, on page 633 of volume II. This mortgage described the property covered by it in the terms of the resolution above quoted (p. 637).

It will be remembered, as we have heretofore shown, that this five-eighths of the capital stock of the Des Moines Union Railway Company (2,500 shares) was transferred to F. M. Hubbell & Son on the 4th day of October, 1893, and has ever since stood upon the books of the defendant company in that name.

The first interest, either direct or indirect, which the Chicago, Milwaukee & St. Paul Railway Company had in the transactions under consideration, or in any of the companies interested in said transactions, grew out of two contracts dated March 15, 1894, one of which is a contract between that company and Frederick M. Hubbell and Frederick M. Hubbell & Son, and appears as complainants' exhibit 80 (commencing at page 838 of volume II), and the other of which appears as defendants' exhibit 309 (p. 1618, Vol. IV), and which was between the Des Moines, Northern & Western Railway Company and the Chicago, Milwaukee & St. Paul Railway Company. These contracts, however, were not actually executed until the 17th of July, 1894 (see testimony of F. M. Hubbell near bottom of page 1018, volume III).

The negotiations leading up to the making of these contracts were conducted by Mr. Hubbell, representing himself and the Des Moines Northern & Western Railway Company, and Roswell Miller, president of and representing the Milwaukee Company (testimony of F. M. Hubbell near top of page 1019, volume III).

By the terms of the contract between the Des Moines, Northern & Western Company and the Chicago, Milwaukee & St. Paul Company (Ex. 309, Vol. IV, p. 1618), the former company was to receive a division of the through rate on joint business, at percentages fixed in the contract and depending upon the origin and desti-

nation of the freight. In consideration of the execution of this contract, F. M. Hubbell and F. M. Hubbell & Son entered into the contract with the Chicago, Milwaukee & St. Paul Railway Company heretofore referred to (Vol. II, p. 838), by which the Hubbells made a present to the Chicago, Milwaukee & St. Paul Railway Company of 16,800 shares of the capital stock of the Des Moines, Northern & Western Railway Company and agreed to sell it an additional 6,468 shares at any time between January 1, 1897, and the first Monday in April, 1899, for \$46,200.00. The thing which induced the making of these contracts on the part of the Hubbells is detailed by Mr. F. M. Hubbell (near the top of page 1020, volume III) as follows:

"Some time during the summer of 1893, the Milwaukee Company notified the Des Moines, Northern & Western Railway Company that the divisions in freight interchanged between the two companies would be reduced from 50 per cent to 25 per cent. This great reduction in the division would prevent the Des Moines, Northern & Western Railway Company from earning its interest and operating expenses; and rather than submit to bankruptcy and a foreclosure, we made this arrangement in order to obtain an increase in the division in favor of our company to 40 per cent, hoping thereby that we could earn sufficient revenue to pay operating expenses and interest on the bonds."

As we have heretofore shown, before the making of this contract and during the negotiations which led up to it, Roswell Miller, president of the Milwaukee Company, was advised that the Des Moines, Northern & Western Railway Company only owned 1,000 shares of stock in the defendant company, and that five-eighths



of the defendant's capital stock was owned by individuals (see letter of F. M. Hubbell to Roswell Miller, Ex. 308, Vol. IV, p. 1617).

It was further provided in sections 4 and 5 of the contract last above referred to (pp. 839-40) that under certain conditions the mortgage heretofore referred to and given by the Des Moines, Northern & Western Railway Company to the Metropolitan Trust Company, should be foreclosed and the property transferred to the new corporation, in which event the interest of the Milwaukee Company in the capital stock of the new corporation should be the same as its interest in the capital stock of the present corporation.

Afterward a suit was brought in the Circuit Court of the United States for the southern district of Iowa to foreclose the mortgage given by the Des Moines, Northern & Western Railway Company to the Metropolitan Trust Company, and in this suit a decree was entered which appears, commencing on page 645 of volume II, in which decree the property upon which a lien was established was described as

*"a certain line of railroad extending from Farnham street, in the City of Des Moines, in Polk County, Iowa, through the counties of Polk, Dallas, Guthrie, Greene, Calhoun, and Pocahontas, to the Town of Fonda, in said last-named county, and also of a line of railroad extending from Clive to the County of Polk, through the said county to the City of Boone, in the County of Boone, and State of Iowa, \* \* \* Also a one-fourth interest in the capital stock of the Des Moines Union Railway Company, it being by the said mortgage expressly understood and agreed that the said mortgage did not embrace or convey an additional five-eighths interest in the capital stock of said Des*

*Moines Union Railway Company of which the said Des Moines Northern & Western Railway Company was the owner."*

In pursuance of this decree a sale was had at which the property was purchased by G. M. Dodge, F. M. Hubbell and F. C. Hubbell. A report of this sale appears as Complainants' Exhibit 67 (commencing on page 651, volume II), in which report the property sold is described in the terms used in the decree. This sale was approved, and on the 8th of February, 1895, the Commissioner made a Commissioner's deed to G. M. Dodge and others constituting the purchasing committee, in which the property transferred was described as in the decree (Ex. 69, Vol. II, p. 654).

On the 1st day of January, 1895, the articles of incorporation of the Des Moines, Northern & Western Railroad Company were adopted (Ex. 70, Vol. II, p. 657), in which the objects and purposes of the corporation were described in part as follows:

"First. To own, complete, extend, improve, maintain and operate the line of railway heretofore owned and operated by the Des Moines Northern & Western Railway Company, extending from Farnham street, in the City of Des Moines, Polk County, Iowa, through the counties of Polk, Dallas, Guthrie, Greene, Calhoun, and Pocahontas, to Fonda, in said last-named county; also extending from Clive, in the County of Polk, through the counties of Polk, Dallas, and Boone, to the City of Boone, in said last-named county.

Twelfth. *To purchase, own and sell capital stock of the Des Moines Union Railway Company, or any other company owning or operating terminal grounds, tracks or stations."*

To this corporation G. M. Dodge and the other members of the purchasing committee transferred this property by deed appearing as Complainants' Exhibit 71 (Vol. II, p. 663), in which the property was described as in the deed from the Commissioner to them. In none of these records or documents is any reference whatever made to any possible interest (except through the stock) in the terminal property.

About the time of the execution of this deed there was held a meeting of the board of directors of the Des Moines, Northern & Western Railroad Company (Ex. 215, Vol. IV, p. 1487) in which it was resolved to purchase of G. M. Dodge and others constituting the purchasing committee this railway property, which was described as follows:

"A certain line of railroad extending from Farnham street, in the City of Des Moines, Polk County, Iowa, through the counties of Polk, Dallas, Guthrie, Greene, Calhoun, and Pocahontas, to Fonda, in the said last-named county; and also extending from Clive, in the County of Polk, through the counties of Polk, Dallas and Boone to Boone, in the County of Boone, and State of Iowa, \* \* \* also a one-fourth interest in the capital stock of the Des Moines Union Railway Company."

At the same meeting it was resolved (p. 1490) to execute a mortgage to the Metropolitan Trust Company of New York as trustee, upon the property which was described as heretofore set out.

At a meeting of the stockholders of the Des Moines, Northern & Western Railroad Company, on March 5, 1895, certain resolutions were passed on this same subject, in which the property was described as in the deed and former resolution (Ex. 216, Vol. IV, p. 1492).

The Des Moines, Northern & Western Railroad Company after it acquired the property gave a mortgage to the Metropolitan Trust Company of New York (Vol. IV, p. 1518) in which the property was described:

"All its railroad, extending from Farnham street, in the City of Des Moines, County of Polk, and State of Iowa, through the counties of Polk, Dallas, \* \* \* *also a one-fourth interest in the capital stock of the Des Moines Union Railway Company.*"

By the seventh section of the contract of March 15, 1894, between Hubbell & Son and the Chicago, Milwaukee & St. Paul Railway Company, it was provided (Vol. II, p. 841) that the board of directors of the Des Moines, Northern & Western Railway Company should consist of three persons who should be nominated by the St. Paul Company, and four persons to be nominated by Hubbell & Son.

At the annual meeting of the stockholders of the Des Moines, Northern & Western Railway Company, held on January 3, 1895 (ex. 214, vol. IV, p. 1486), this portion of the agreement was carried out and E. P. Ripley, A. J. Earling and P. M. Myers, representing the St. Paul Company, were elected upon the board of directors of the Des Moines, Northern & Western Railway Company, and thereafter three or more representatives of the Milwaukee were upon the board of directors of that company or its successor, the Des Moines, Northern & Western Railroad Company, and during these years the representatives of the St. Paul Company, and particularly Mr. Roswell Miller, president of that company, were active in the management of the affairs of the former company. In this way they

not only became familiar with the affairs of the Des Moines, Northern & Western Railway and Railroad Company, but also with the relations between that company and the defendant, the Des Moines Union Railway Company. They knew that the only interest which the Des Moines, Northern & Western Company had in the Des Moines Union Company was the interest represented by the 1,000 shares of stock which the former had in the latter (ex. 308, vol. IV, p. 1617). They were familiar with the foreclosure of the mortgage upon the property of the Des Moines, Northern & Western Railway Company, the organization of the Des Moines, Northern & Western Railroad Company, and the steps by which the property of the former was transferred to the latter, and had certified copies of all the records in respect thereto. They were furnished with copies of the articles of incorporation of the defendant, the Des Moines Union Railway Company, advised as to what property it owned, and furnished with copies of the contract of May 10, 1889, and the ratification thereof of July 31, 1897. (See the following exhibits of defendants, vol. IV: 317 and 318 (p. 1628); 319 and 320 (p. 1630); 321 (p. 1631); 322 (p. 1632); 323 (p. 1634); 324 and 325 (p. 1636); 326 (p. 1637); 339 (p. 1650); 340 (p. 1651); 341 (p. 1652); 342 (p. 1654); 343 and 344 (p. 1655); 345 (p. 1657); 415 (p. 1763); 416 (p. 1764); 417 and 418 (p. 1765); 419 and 420 (p. 1766); 421 (p. 1767); 425 (p. 1770).)

In the year 1898 the Chicago, Milwaukee & St. Paul Railway Company acquired all the outstanding capital stock and bonds of the Des Moines, Northern & Western Railroad Company for the purpose of consolidating the line of the latter company with its own line of railroad.

At the annual meeting of the stockholders of the Des Moines, Northern & Western Railroad Company held January 5, 1899 (ex. 219, vol. IV, p. 1498), the board of directors elected consisted of W. G. Collins, A. J. Earling, C. A. Goodnow, Burton Hanson, F. M. Hubbell, F. C. Hubbell and P. M. Myers, all of whom, except the two Hubbells, were officers of the Chicago, Milwaukee & St. Paul Railway Company.

At a meeting of the board of directors of the Des Moines, Northern & Western Railroad Company held in Chicago on April 24, 1899, at which were present the members of the board of directors above named, except the two Hubbells (ex. 220, vol. IV, p. 1499), there was laid before the board of directors a proposition made by the Chicago, Milwaukee & St. Paul Railway Company looking toward the consolidation of the property of the two companies, a part of such resolution being as follows (p. 1503):

“Resolved, that the Des Moines, Northern & Western Railroad Company be, and is hereby requested to sell and convey to this Company all its railroad and property and for this purpose to make, execute and deliver, through its proper officers, a good and sufficient deed of conveyance, conveying and transferring to this Company all its railroad and property of every name and nature, wheresoever situated, and all its rights, franchises, licenses, privileges and immunities of every kind, howsoever derived, in consideration of the sum of One Dollar and of the cancellation and surrender by this Company of all the above mentioned mortgage bonds of the Des Moines, Northern & Western Railroad Company, amounting in the aggregate to the sum of \$2,933,000, with the interest due thereon, and of the payment of all other lawful debts of said Company; and this Company

hereby agrees that, upon the delivery to it of such deed, it will cancel and surrender the said mortgage bonds and will assume and pay all other lawful debts of said Des Moines, Northern & Western Railroad Company, and hold said Company free and clear and harmless therefrom."

Upon consideration of this proposition, the directors of the Des Moines, Northern & Western Railroad Company passed a resolution accepting this offer and calling a meeting of the stockholders for the purpose of considering it (p. 1504). It will be noted that this proposition of the Milwaukee was to acquire all the property of the Des Moines, Northern & Western Railroad Company of whatever character. This stockholders' meeting was held on May 8, 1899 (ex. 222, vol. IV, p. 1508). At this meeting the stockholders authorized the transfer of the property of the Des Moines, Northern & Western Railroad Company to the Milwaukee Company, and authorized the execution of a deed transferring the same, a part of which reads as follows (p. 1512):

"Whereas, the Des Moines, Northern & Western Railroad Company now owns and operates a certain line of railroad, commencing at the east line of Section Seven (7), Township Seventy-eight (78) North, Range Twenty-four (24) West, in the City of Des Moines, Polk County, Iowa, and thence extending in a general northwesterly direction, via Clive in said County, through the Counties of Polk, Dallas, Guthrie, Greene, Calhoun and Pocahontas, to Fonda in said last named County; and also a line of railroad extending from Clive, in said County of Polk, through said County of Boone, in the County of Boone; said lines of railroad hav-

ing an aggregate length of about one hundred and fifty miles, all in the State of Iowa;

• • • • •

*and also one-fourth interest in the capital stock of the Des Moines Union Railway Company."*

The east line of section 7 referred to in this deed was coincident with the west city limits of the City of Des Moines at that time and what is now known as Twenty-eighth Street, which is approximately a mile west of what was formerly known as Farnham Street and now known as Sixteenth Street. This was the form of the deed approved by the stockholders of the Des Moines, Northern & Western Railroad Company in carrying out the proposition to transfer to the Milwaukee Company all its property, and shows clearly that at this time no claim was made that that company owned any interest in the terminal property other than that represented by its stock. This deed was executed as authorized, delivered to the Chicago, Milwaukee & St. Paul Railway Company, and filed for record (ex. 74, vol. II, p. 673).

As above noted, this deed from the Des Moines, Northern & Western Railroad Company to the complainant, the Milwaukee Company, described the line of road as commencing at the east line of section 7, whereas, all former transfers and mortgages of the property had described it as commencing at Farnham Street. To correct this error in the description, a special meeting of the stockholders of the Des Moines, Northern & Western Railroad Company was held on June 12, 1907 (ex. 75, vol. II, p. 678). This was more than eight years after the execution of the deed last above referred to, during which eight years the Chi-



ago, Milwaukee & St. Paul Railway Company had had two representatives on the board of directors of the defendant company.

At this meeting a resolution was passed reciting the fact that by the transactions of 1899 heretofore referred to, it was the intention to transfer to the Milwaukee Company all the railroad and property of the Des Moines, Northern & Western Railroad Company "of every name and nature, wheresoever situated, and all its rights, franchises, licenses, privileges and immunities of every kind, howsoever derived," and reciting the fact that through some error or oversight the deed described the property as commencing at a point on the east line of section 7, instead of "Sixteenth Street (formerly called Farnham Street), in the said City of Des Moines," and then states:

"Now, Therefore, Be It Resolved, that for the purpose of correcting such error and carrying out the purpose and intent of this Company to convey to the said Chicago, Milwaukee & St. Paul Railway Company its *entire* property as aforesaid, the President and Secretary of this Company be required and directed to execute and deliver to the Chicago, Milwaukee & St. Paul Railway Company, a deed in due form of law, of that part of the said tracks and right of way omitted as aforesaid, to-wit: That part of said tracks, right of way and fixtures between the said Sixteenth Street (formerly called Farnham Street) and the said Western Avenue or Twenty-eighth Street, inclusive, in the said City of Des Moines."

In pursuance of this resolution a correction deed was executed, delivered and recorded (ex. 76, vol. II, p. 680).

If the complainants, as successors of the three railroads parties to the contract of January 2, 1882, are the real owners of the terminal property, and the title thereto is simply held by the defendant company in trust, or if they have an easement in the property which entitles them to the use and occupation thereof in perpetuity for railway purposes, or any other interest therein except as represented by the capital stock in the defendant company owned by them, it is singular that no such thought is contained in the deeds by which the property was transferred to the terminal company, and it is singular that in the various transfers and mortgages of these properties through which complainants trace their title, no reference is made to such an interest in the terminal property, and it is singular that wherever in these transfers or mortgages any reference is made to their interest in the terminal property, it is always referred to as that of owners of the capital stock in the defendant company.

The necessary and legitimate inference is that from May 1, 1888, up to the time of the commencement of this suit, none of the parties suspected that the defendant company did not have an absolute title to this property. The various parties to these transactions were the ablest lawyers and shrewdest business men among those who for many years had carried on the largest enterprises in the Middle West, and this record shows that during all these years in these various instruments they have with the greatest care particularly described the properties in which these various companies have been interested, and all of them have been drawn upon the theory that the terminal property was the absolute property of the defendant company.

**THE NEGOTIATIONS WITH RESPECT TO A RE-  
NEWAL OR EXTENSION OF THE TERMINAL  
CONTRACT OF MAY 10, 1889.**

By the year 1896 there had come a change in the situation. The railroad companies, original parties to the contract of May 10th, 1889, were no longer operating the railways and were either dead or in a dying condition. Their successors, the Wabash Company and the Des Moines, Northern and Western, had come into the contract arrangement apparently as a matter of course, but some of the parties interested doubted that these companies were bound by the contract. This doubt somewhat discredited the bonds of the Des Moines Union Company on the market and as the Wabash was a holder of these bonds and wanted to dispose of them, it wanted that doubt removed.

So, on December 26, 1896, Mr. Ashley, as President of the Wabash, wrote to Mr. Hubbell, as Secretary of the Des Moines Union, as follows (Rec., vol. IV, p. 1673):

"Permit me to remind you of our understanding to the effect that you would have prepared at once a new agreement for the tenant companies of the Des Moines Union Railway Co. to sign; this new agreement being considered necessary on account of the foreclosure of the Des Moines & Northwestern. I understand that the agreement will be exactly as before, except that the time must be made to correspond with the life of the bonds, or to be made for a period to extend beyond their maturity.

I write now for the purpose of urging the immediate preparation of this agreement, as without it we cannot well dispose of our bonds. When it is ready please forward it to Colonel Blodgett, asking him to examine the same and to send it to me

as soon as possible. I should not suppose it would take long to have the agreement prepared and as time in this case is of importance I hope you will see that the paper is gotten under way at once. Perhaps you have already taken the matter in hand and if so, so much the better."

Mr. Hubbell took up the matter at once with Mr. Cummins, who in turn entered into correspondence with Colonel Blodgett. Various changes were proposed and discussed upon the one side and the other, and the outcome was the contract of July 31st, 1897, called the Ratification Agreement (Rec., vol. II, p. 506).

This, it will be seen, followed substantially the suggestion of Mr. Ashey that "the agreement will be exactly as before."

The agreement recites the contract of 1889 and annexes a copy. It notes the passing from the scene of the old railroad companies and that the successor companies had both been using the terminal property and had recognized the contract of 1889 as binding upon them and then proceeds:

"Whereas, it has been doubted whether the said contract is legally binding upon the said Wabash Company and the said Des Moines, Northern & Western Company;

"Now, Therefore, in consideration of the premises and for the purpose of removing all doubt with respect to the said subject, it is now agreed by and between the parties hereinbefore named, that the said contract, a copy of which is attached, shall be and become binding and obligatory upon said Wabash Company and the Des Moines, Northern & Western Company."

There follow stipulations, first by the Wabash and then by the Des Moines, Northern and Western, that the Company will make the payments provided with respect to its railroad, and that when it ceases to operate its road, its obligation under the contract shall cease and pass to its successor company.

It was also provided that so much of the contract of 1889 "as relates to the issuance and distribution of the capital stock of the said Des Moines Company (the terminal) is no longer binding, and that the capital stock of the said Des Moines Company is as follows:

The Purchasing Committee of the Wabash, St. Louis and Pacific Railway Company .....	500 shares,
The Des Moines, Northern and Western Railroad Company.....	1,000 shares,
F. M. Hubbell & Sons.....	2,500 shares."

There follows a statement of a few qualifying shares for directors which we need not consider.

This agreement was made at the instance of the Wabash Company and it was a party thereto, and the Des Moines, Northern and Western, predecessor of the Milwaukee, and on whose Board of Directors the Milwaukee then had three members, was also a party, and as we shall show, the Milwaukee must have known and did know all about the Ratification Agreement and hence of the agreement of 1889.

And here again the ownership of the terminal property of the Des Moines Union and the relation of the other companies to it as tenants were fully recognized.

It will be remembered that in 1898 the Milwaukee Company acquired all the outstanding stock and bonds of the Des Moines, Northern & Western Railroad

Company. A portion of this stock and bonds was purchased of the defendant, F. M. Hubbell & Son (exs. 413, 414, vol. IV, pp. 1759-90). According to these letters, the sale of these bonds and stock was to be closed up on the 6th of December, 1898. On December 2, 1898, Mr. Miller, President of the Chicago, Milwaukee & St. Paul Railway Company, wrote to Mr. Hubbell the following letter (ex. 418, vol. IV, p. 1765) :

"I observe that the contract between the Des Moines Union Railway Company and the Des Moines, Northern & Western Railroad Company is only for 20 years. I think it should be for 50 years. Have you any objection to extending it for so long?"

In carrying out the agreement to sell to the Milwaukee these bonds and stocks, Mr. Miller met Mr. Hubbell in New York, December, 1898, and there requested Mr. Hubbell to agree that the defendant company would extend to the Des Moines, Northern & Western the operating contract of May 10, 1889, for 100 years (testimony of F. M. Hubbell, vol. III, pp. 1023-4). With respect to it, Mr. Hubbell testified (near the top of page 1024) :

"He was ready to buy our bonds and stock if I would write him a letter that the Des Moines, Northern & Western Railroad Co. should give him a contract with the Des Moines Union the same as the present contract for one hundred years. He pressed me hard to sign such a letter, I refused and told him that I would come back to Iowa and see if we could get him a contract extending the contract of July 31st, 1897."

This testimony of Mr. Hubbell's is corroborated by a letter which Mr. Hubbell on that day wrote to his brother-in-law, H. D. Thompson, and to his son, which appears as defendants' exhibit 421 (vol. IV, p. 1767).

As a result of this request on the part of Mr. Miller, a contract was prepared by Mr. Cummins, which appears as defendants' exhibit 430 (vol. IV, p. 1772). In this contract it was recited that the defendant company owned and operated the terminal company. This contract was submitted to Mr. Miller and to the general counsel of the Milwaukee Company, George R. Peck, but the same was never consummated because there were some provisions in the contract upon which they could not agree, but no question was ever raised as to the correctness of the recitations in the contract to the effect that the terminal property was owned by the defendant company.

From time to time thereafter attempts were made by the defendant company on the one hand, and the complainants on the other, to agree upon a new terminal contract, but they were unsuccessful, not because any question was ever raised about the absolute ownership of the terminal property by the defendant company, but because they were unable to agree upon the compensation which was to be paid by the complainants for the use of the terminal. (See vol. IV, exs. 454 (p. 1800); 455 (p. 1801); 456 and 457 (p. 1802); 458 and 459 (p. 1803); 460 (p. 1804); 466 and 467 (p. 1807); 468 (p. 1808); 471 (p. 1810); 479 (p. 1818); 480 (p. 1819); 481 (p. 1820); 484 (p. 1822); 485 (p. 1823); 486 and 487 (p. 1825); 488 (p. 1826); 492 (p. 1828); 493 (p. 1829); 494 (p. 1830); and 495 (p. 1832).)

In addition to this, the defendant company from time to time entered into contracts with other railway

companies, by which it agreed to furnish such other railway companies terminal services. These agreements are, one with the Chicago, St. Paul & Kansas City Railway Company (ex. 524, vol. IV, p. 1871), one with the Chicago Great Western Railway Company (ex. 526, vol. IV, p. 1879), one with the Iowa Central Railway Company (ex. 526a, vol. IV, p. 1894), one with the Chicago, Burlington & Quincy Railroad Company (ex. 527, vol. IV, p. 1901), one with the Des Moines, Iowa Falls & Northern Railway Company (ex. 528, vol. IV, p. 1911), and one with the Des Moines & Fort Dodge Railroad Company (ex. 529, vol. IV, p. 1920).

In each one of these contracts the terminal property is described as being owned by the defendant company, in almost the identical language that is used for that purpose in the contract of May 10, 1889, with the complainants' predecessors. Each one of these contracts was approved by directors of the defendant company who represented complainants and their predecessors upon the board of that company, because the articles of incorporation of the defendant company provide that no such contracts can be made unless they are approved by the unanimous vote of the board of directors. In fact, no question was ever raised after May 1, 1888, up to the time of the commencement of this suit in 1907, with respect to the ownership of this property by the defendant. It is impossible to find a single word in this record to show that complainants or their predecessors at any time between those two dates ever claimed to have any interest in the terminal property of any kind or character, except the interest which is represented by the stock which they hold, and the record is full of contracts, deeds, resolutions, letters and other transactions recognizing the ownership



of the defendant by the plaintiffs and their predecessors.

So far we have discussed this case for the purpose of ascertaining the intent of the parties by the transactions which resulted in the transfer of the title, ownership and possession of the terminal property to the defendant company in the year 1888. We will now go to another phase of the case, but in doing so we do not wish to be understood as thinking we have at all exhausted the subject of intent. To exhaust this subject we would have to refer to every item of evidence contained in this long record, because there isn't a thing in the record from the time of the original inception of the terminal company down to the bringing of this suit, which does not evidence the intent to give to the defendant company a perfect title to the property. The things to which we will call attention in subsequent divisions of our argument will all bear upon the question of intent, as well as upon other phases of the case which we will discuss.

## II.

THE AMENDMENT TO THE ARTICLES OF INCORPORATION OF THE DES MOINES UNION RAILWAY COMPANY ENACTED APRIL 8, 1890, AND THE RESOLUTION PASSED BY THE STOCKHOLDERS AT THAT MEETING.

Brief reference has heretofore been made to these amendments and resolutions, and the court no doubt understands in a general way their nature. It will be remembered that of those who were present at this meeting, James F. How, Vice-President of the Wabash Company, Charles M. Hays, General Manager of the

Wabash Company, and F. M. Hubbell, Secretary of the defendant company, were active in the transactions of 1884, 1887 and 1888, in which the title and ownership of the terminal property were transferred to the defendant, and knew what was thereby intended; and these amendments and the resolutions clearly show that it was understood by these persons and the others who were present at the meeting, that it was intended by the transactions heretofore referred to, to vest in the defendant company an absolute title to the property. But upon this phase of the situation we need not enlarge at this time.

If the court, in view of the facts to which we have heretofore called its attention, believes that the result of the transactions which culminated in the surrender of the property to the defendant company on May 1, 1888, was to vest in the terminal company a good title to the property, the amendments to the articles of incorporation above referred to are not of great importance, but if there is any lingering doubt in the mind of the court as to the nature of defendant's title, then a consideration of these articles and resolutions becomes important for the reasons which we will hereafter point out.

It is the claim of complainants, as we understand it, that notwithstanding the fact that the defendant company was organized as a corporation for pecuniary profit for the purpose of acquiring, owning and operating the terminal property, and notwithstanding the fact that by the resolutions of 1884 the three railway companies who, plaintiffs claim, were the beneficial owners of the property, authorized the transfer of the ownership thereof to the defendant company, and notwithstanding the fact that the resolutions of 1887 author-

ized the trustees to transfer the property to defendant without any reservations, upon being paid the agreed purchase price therefor, and notwithstanding the fact that the Des Moines & St. Louis Railroad Company executed and delivered to the defendant company a warranty deed to the property, and notwithstanding the fact that the St. Louis, Des Moines & Northern Railway Company executed and delivered to the defendant company an absolute deed to the property without reservations, and notwithstanding the fact that How and Dodge executed deeds to that portion of the property standing in their names, without any reservations, and notwithstanding the fact that the defendant paid to the parties entitled thereto the purchase price agreed upon, and notwithstanding the fact that from May 1, 1888, down to the commencement of this suit, every person and corporation connected with the transaction treated the property as the absolute property of the defendant company; yet by reason of the fact that there was incorporated as a recitation in the original articles of incorporation of the defendant company a copy of the contract of January 2, 1882, and an attempt made in articles 2 and 4 of defendants' articles of incorporation to limit the power of the defendant to alienate the property, and by reason of certain references to the contract of January 2, 1882, in the resolutions of 1887, the defendant company acquired the title to the property in trust only and for the benefit of complainants' predecessors, or acquired the title subject to an easement in favor of complainants' predecessors to use the property in perpetuity for terminal purposes.

Our answer to this contention is, if there is any question about the effect of the transactions resulting in the transfer of the property to the defendant company in

1888, that question was forever set at rest by the action of the stockholders of April 8, 1890. In other words, the effect of this action was to quiet the title to the property in the defendant company, if theretofore there was any question about the title.

For the convenience of the court, we here set out in parallel columns the sections of the original articles of incorporation upon which complainants base their claim, and the corresponding articles as amended on April 8, 1890 (vol. II, p. 489), also sections ratifying the purchase of the terminal property, and the section striking from the original articles of incorporation the contract of January 2, 1882:

ORIGINAL.

"Article 2.

The general nature of the business to be transacted shall be the construction, ownership and operation of a railway in, around and about the City of Des Moines, Iowa, including the construction, ownership and use of depots, freight-houses, railway shops, repair shops, stock-yards and whatever else may be useful and convenient for the operation of railways at the terminal point of Des Moines, Ia., as well as the transfer of cars from the line or depot of one railway to an-

AMENDED.

"Article 2.

The object of the corporation and the general nature of the business to be transacted shall be the purchase, lease, construction, ownership, maintenance and operation of a system of railway in, around and about the City of Des Moines, Polk County, Iowa, including the construction, purchase, ownership, maintenance and use of a union depot, depots, freight houses, railway shops, repair shops, stock yards and whatever other things may be useful or convenient for the operation of

other, or from the various manufactories, warehouses, store-houses, or elevators to each other or to any of the railways or depots thereof, now constructed or to be hereafter constructed, in or around said City of Des Moines, and such corporation shall possess all the powers conferred upon corporations for pecuniary profit by Chapter I, of Title IX, of the Code, and the amendments thereto. All the powers exercised by this Company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882, by and between the Des Moines and St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Jas. F. How, Trustee, and Grenville M. Dodge. The said Company shall have the right to lease or otherwise dispose of the use of any part of its franchises to any other Railway Company—provided that the

railways at terminal stations, as well as the transfer and switching of cars from the line or depot of one railway to another, or from the various manufactories, warehouses, elevators or other source of traffic to each other or to any of the railways or depots thereof, now constructed or hereafter to be constructed in or around said City of Des Moines, and also to lease terminal facilities to and furnish and perform terminal services for all railways whose lines reach or pass through or near the said City of Des Moines, and the corporation shall possess all the power conferred upon railway corporations by the laws of the State of Iowa, including the power to condemn private property for its use.

absent in writing of the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines and Northern Railway Company shall be necessary before any such lease or disposition can be made to any other than the parties above named.

### Article 3.

The capital stock of this corporation shall be One Million (\$1,000,000.00) Dollars, which shall be divided into shares of one hundred (\$100.00) Dollars each, and shall be paid in at such times and in such manner as the Board of Directors may determine, and the Board are authorized to receive in payment therefor the property and franchises in the City of Des Moines, now held by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Trustee, Jas. F. How and Grenville M. Dodge.

### Article 3.

The capital stock of the corporation shall be two million dollars (\$2,000,000.00) which shall be divided into shares of one hundred dollars each; said shares shall be paid for and issued in the manner following and not otherwise; four thousand shares as a part of the purchase price of the terminal property originally acquired by the corporation, it being now agreed by all the stockholders that said sum of four hundred thousand dollars, together with the first mortgage bonds theretofore issued for that purpose constituting the fair value of said property when so acquired; and all resolutions and proceedings of

the corporation heretofore had with respect to the amount of capital stock to be issued as such purchase price, are set aside and held for naught.

Said four thousand shares of capital stock shall be issued to the following corporations and in the following proportions:

Two thousand shares to the Purchasing Committee of the Wabash, St. Louis & Pacific Railway Company, successor in ownership to the Des Moines & St. Louis Railroad Company, and the present owner of the property known as the Des Moines & St. Louis Railroad.

One thousand shares to the Des Moines & Northwestern Railway Company, successor to the Des Moines Northwestern Railway Company, and

One thousand shares to the Des Moines & Northern Railway Company successor to the St. Louis, Des Moines & Northern Railway Company, and the said shares are hereby declared to be fully paid by the transfer of the

aforesaid property. The remaining capital stock, to-wit; sixteen thousand shares, or any part thereof, shall be issued only by the authority of a resolution of the stockholders adopted by the vote of more than seven-eighths of all the stock theretofore issued and shall be fully paid either in money or property at its fair market value, before certificates thereof shall be executed and delivered.

The stock shall be transferable only on the books of the Company by and with the consent of three-fourths of all the Directors except in case the transferee of the stock is, or becomes the owner of either of the railroad properties above mentioned, in which event the stock shall be transferable by right and without consent.

#### Article 4.

The affairs of the Company shall be managed by a Board of eight directors, who shall be elected annually, by the stockholders, on the first Thursday of January of

#### Article 4.

The affairs of the corporation shall be managed and its business conducted by a Board of Directors composed of eight persons, who shall be elected by the stockhold-



each year. The provisional Board of Directors, who shall hold office until the first Thursday in January, A. D. 1886, shall consist of Jas. F. How, A. L. Hopkins, A. A. Talmage, J. S. Runnells, J. S. Polk, F. M. Hubbell, G. M. Dodge, C. F. Meek.

Four members of the Board shall be nominated by the Wabash, St. Louis & Pacific Railway Company, two members by the Des Moines Northwestern Railway Company and two members by the St. Louis, Des Moines & Northern Railway Company, and no stockholders shall be eligible for membership of the Board unless so nominated.

The fact that a candidate has been duly nominated shall be certified to the Stockholders' meeting of this Company by the Secretary of one of the respective companies aforesaid and such certification shall be conclusive.

The provision herein with respect to nomination for the Board of Directors shall apply to and be enjoyed by any

ers at their regular annual meeting to be held at the office of the Company in Des Moines, Iowa, on the first Thursday of January of each year, and they shall hold their offices for one year and until their successors are elected and qualified, but at all future elections of Directors, it shall require the votes of more than seven-eighths of all the stock theretofore issued to elect any director.

The Board of Directors shall have the power to authorize the execution of mortgages, to issue bonds, to enter into contract, to purchase property, to construct buildings, to make leases, to authorize the institution of condemnation proceedings and to do all such other things as may be proper or necessary for the corporation to do, but with respect to the matters above mentioned and all other matters except the ordinary operation of the property, the Board of Directors can act only upon the unanimous vote of the eight members thereof, and in order to facilitate the transaction of business.

grantee or assignee of either of the railway companies aforesaid. No contract, lease, or other agreement, amounting to a permanent charge upon the property of the corporation, shall be entered into by the Board unless the same shall have been first approved by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines and Northern Railway Company, or their assigns, and shall have been submitted to a meeting of the stockholders, duly called, and shall have been approved by more than three-fourths of all the stockholders; and it shall not be within the power of the Board of Directors to create any limitation whatsoever upon any of the franchises of the corporation, except the same shall have been submitted to and approved by the stockholders as hereinbefore provided.

The Directors shall elect, from their number, a President, Vice President, Secretary and

power is expressly conferred upon each of the Directors to delegate by written authority, some other person to act or vote for him, and in his stead.

Provided that such authority shall be filed with the Secretary at or before the time the meeting convenes.

The Board of Directors shall annually select an Executive Committee, but such selection must be made by the vote of at least seven members. The duties and powers of such Committee shall be defined in the By-Laws.

The Board shall elect the officers of the corporation hereinafter provided for and shall have the power to enact and publish by-laws not inconsistent herewith, but such officers must be elected and such by-laws enacted by the unanimous vote of the eight members of the Board. All vacancies occurring in the Board shall be filled by the stockholders at a special meeting in the manner heretofore provided for the election of Directors.

Treasurer. All vacancies arising from the death or resignation of a member of the Board shall be filled by the Board.

Article 14, as adopted April 8, 1890, is as follows :

“Article 14.

The purchase of the property heretofore conveyed to the corporation, the conveyance made in pursuance thereof, the execution of Trust Mortgage to the Central Trust Company of New York, dated February 28th, 1887, and recorded in the Recorder's office of the County of Polk, State of Iowa, on the 21st day of May, 1888, in book 196 at page 525 and the issuance of bonds secured by the same are hereby approved, ratified and confirmed.”

Article 15, as adopted April 8, 1890, is as follows :

“Article 15.

The proceedings of a meeting held December 10, 1884, with certain preambles, including a contract executed on the 2nd day of January, 1882, between the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, consented to by the Wabash, St. Louis & Pacific Railway Company, which now appears as part of the Articles of Incorporation of this Company, are hereby repealed, stricken out and expunged.”

As we understand it, it is the claim of complainants that these amendments were invalid and ineffective, for the following reasons :

1. Because at this time (April 8, 1890), no certificates of shares of stock had been actually issued by the defendant company, and therefore there were no stockholders who could amend the articles.

2. Because the persons who were present at the meeting and purported to represent the complainants' predecessors, had no authority to act for them.

3. That the amendment to the articles of incorporation and the passage of the resolutions referred to were the acts of the defendant company, and that such action by the defendant company could not affect any interest which complainants' predecessors had in the property.

4. That the published notice of the amendment of the articles is insufficient as to Article II. This objection is made for the first time in this Court.

Our contention is as follows:

(a) The stockholders were the persons and corporations who were entitled to the stock of the defendant company under the articles of incorporation and contracts by which the defendant acquired title to the terminal property and the persons who were representing them. The issue of the actual certificates of shares of stock was not necessary in order to constitute them stockholders.

(b) The stockholders had both actual and constructive notice of the meeting and the purpose thereof. The presumption is that the stockholders were lawfully represented at the meeting, and the evidence fails to overcome this presumption.

(c) That the adoption of the amendments and the resolutions were acts of the stockholders (acts of complainants' predecessors) as distinguished from the acts of the defendant corporation, and the plaintiffs and their predecessors were bound thereby.

(d) These amendments to the articles were properly signed, acknowledged and recorded and notice thereof was given as required by the Iowa statute. The complainants and their predecessors had both actual and constructive notice thereof. They carried on the business of the defendant corporation under these amendments for the period of seventeen years before the commencement of this suit, and are now estopped by their laches to raise the question of the validity of these amendments.

(e) The complainants acquired the stock which they hold in the defendant company long after the adoption of these amendments and the resolution referred to, and cannot now raise any question as to their validity.

(f) The adoption of these amendments and this resolution, and the acquiescence of the plaintiffs and their predecessors therein and the continuous conduct by them of the business of the corporation in accordance therewith for the period of seventeen years, is one of the strong grounds of estoppel urged by the defendants, the Hubbels, as against the complainants' right to a decree which would destroy the value of the 2,500 shares of stock which they own in the defendant company.

(g.) The published notice of the amendments was sufficient in every respect and in any event the amendments made are good as between the parties.

We will consider these grounds in their order :

**(a) AS BETWEEN THE STOCKHOLDERS AND THE CORPORATION, THE ISSUANCE OF A CERTIFICATE OF STOCK IS NOT NECESSARY.**

The general rule laid down by

*Thompson on Corporations*, 2d Ed., Vol. 4,  
§ 3455,

is as follows :

“Sec. 3455. *Certificate merely a muniment of title*—Broadly speaking, a share certificate is merely the paper representative of an incorporeal right of a stockholder. It is nothing more than the symbol or paper evidence of a proprietary right. It stands on a footing similar to other muniments of title. In other words, the act of subscribing for the shares gives title to the subscriber, and the certificate neither constitutes nor is necessary to it; it is only evidence of title. The certificate transfers nothing from the corporation to the stockholder, but only affords him the evidence of his rights. \* \* \* An original proprietor and subscriber for shares, having paid his installments thereon, has a complete title, though there has been no formal entry in the books of the corporation passing the stock to his credit. \* \* \*

“Sec. 3507. *Issuance of certificate not necessary to constitute relation of stockholder*—While a contract and an intention to assume the relation is necessary to make one a stockholder, the rule is that a certificate is not required to constitute this relation. It has been expressly held that, ‘it is not essential that a certificate should have issued in order to create the relation of stockholder, provided a contract to take stock has been duly made, or provided the rights, privileges and emol-

uments of a stockholder had been enjoyed, with the consent of the corporation.' The certificate is not in itself property, but is merely the symbol or paper evidence of property, and the proprietary right may exist without the certificate. A person may acquire the rights and incur the liabilities of a shareholder, both to the corporation and to its creditors, although no certificate has in fact been issued. In other words, one who has subscribed for stock and fulfilled the annexed conditions, or one to whom stock has been apportioned, has all the rights of a stockholder, though no certificate has been issued to him. It follows that a subscription cannot be rescinded on the ground that certificates had not been issued to the subscriber. Among other things he may vote at corporate elections, and hold corporate offices. He has the power to transfer his stock, and to receive dividends, and is liable to assessment on his shares, and to creditors for the debts of the corporation to the same extent as though certificates had been issued to him. \* \* \* The issuance of a certificate to a person and his receipt of the same raises the presumption that he owns the share."

This is the rule in Iowa.

*First Nat. Bank v. Gifford*, 47 Iowa 583.

"The former owner of the stock, Mr. Ochs, delivered the certificate held by him to Porter, and the stock was assigned by the former to the latter by means of what is termed a transfer ticket, and an entry thereof was made in the transfer book of the bank. No certificate was ever issued to Porter, and the Ochs certificate was cancelled, or at least the defendant does not claim that it was ever assigned to him.

It is useless to consider what would be the rights of the defendant if a certificate had been executed

to Porter, and by him assigned to the defendant, and no transfer entered on the books of the bank, for no such state of facts is presented by the finding.

As between Porter and the corporation, he was the undoubted owner of the stock. No certificate was required to perfect his title. It mattered not whether one ever was issued. He being the owner, and the bank not chargeable with notice of defendant's rights, Porter had the right to sell and transfer said stock, and the bank was bound to recognize his transferee as owner. Whatever title Porter had was obtained by Smith and Whitaker.

It seems to us that the transfer on the books of the bank was sufficient to make Porter's title full and complete. A stock certificate would be only additional evidence of his title, but it was by no means essential."

*Morrow v. Gould*, 145 Iowa, 4.

"It follows from the foregoing definitions that shares of stock represent an interest in the earnings and property of the corporation and that a certificate is not stock itself but only a convenient representation of it for one may be a stockholder without having a certificate issued to him."

In *Penderg v. Carleton*, 87 Fed. 41,

the rule is laid down by Thayer, Circuit Judge, as stated in the syllabus, as follows:

"A mining company contracted with complainant for the purchase of his interest in certain mining property, in consideration of a certain proportion of its capital stock, which stock, however, was never issued to him. Later, the board of directors, in good faith, order a sale of all the company's stock to pay the expenses of development, and pur-



chased it themselves, but without taking undue advantage of any other interested parties. Finally, the property, proving of little or no value for mining purposes, was sold—the sale being an advantageous one—and the proceeds divided among themselves by the directors, who believed themselves to be the only shareholders. On suit against the directors for an accounting, held, that complainant was the equitable owner of the agreed amount of stock, and was entitled to such proportion of the net proceeds of the sale as his stock bore to the total capital of the company, and no more, with interest from the date of filing the amended bill asking for such accounting.”

This Court, in *Hawley v. Upton*, 102 U. S. 316, said:

“It cannot be doubted that one who has become bound as a subscriber to the capital stock of a corporation must pay his subscription if required to meet the obligations of the corporation. A certificate in his favor for the stock is not necessary to make him a subscriber. All that need be done, so far as creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the capital stock of the corporation represents. If such an obligation exists, the courts can enforce the contribution when required. After having bound himself to contribute, he cannot be discharged from the obligation he has assumed until the contribution has actually been made, or the obligation in some lawful way extinguished. These are elementary principles.”

And in *Jellenik v. Huron Copper Mining Co.*, 177 U. S. the Court said, l. c. 13:

“The certificates are only evidence of the ownership of the shares, and the interest represented by the owner.”

Applying the rule to this case, the St. Louis Des Moines & Northern Railway Company, the Des Moines & St. Louis Railroad Company and the Des Moines Northwestern Railway Company, by virtue of certain resolutions passed by the boards of directors of those companies and certain notices served on the Des Moines Union Railway Company in November, 1887 (exs. 11, 12, 13, 14 and 15, vol. II, pp. 435-443 incl.), became subscribers to the capital stock of the Des Moines Union Railway Company. The Des Moines Union Railway Company accepted these subscriptions by virtue of the action of its board of directors on November 8, 1887 (ex. 102, vol. II, p. 259). The three subscribers for this capital stock caused the same to be paid for by the execution of deeds (exs. 17, 18, 19, 20, 21 and 22, vol. II, pp. 446-59 incl.) and thereafter they, or their successors, were stockholders in the Des Moines Union Railway Company, although no certificates were actually issued until April 8, 1890.

It will be noted that the resolution of the Des Moines & St. Louis Railroad Company (ex. 12, vol. II, p. 437) authorized its proportion of the stock to be issued to the Purchasing Committee of the Wabash, St. Louis & Pacific Railway Company.

While this resolution of the Des Moines & St. Louis Railroad Company may not of itself have bound the Purchasing Committee as stockholders, yet this action was ratified by the Purchasing Committee by selling and transferring a portion of the stock and accepting the issuance of the stock at the time it was issued in April, 1890.

And from the day of the incorporation of the company down to the last day to which this record recites

they and their successors acted consistently as the stockholders of the company.

**(B) THE STOCKHOLDERS HAD BOTH ACTUAL AND CONSTRUCTIVE NOTICE OF THE MEETING AND THE PURPOSES THEREOF. THE PRESUMPTION IS THAT THE STOCKHOLDERS WERE LAWFULLY REPRESENTED AT THE MEETING, AND THE EVIDENCE FAILS TO OVERCOME THIS PRESUMPTION.**

It was provided in the original articles of incorporation of the defendant company as follows (vol. II, p. 422):

**"Article 9.**

These Articles may be amended by a vote of more than three-fourths of all the stock in favor thereof, at a meeting of stockholders thereof, of which a notice containing the proposed amendments shall be mailed to each stockholder at his address, as disclosed by the transfer books of the Company. Notice of such proposed meeting shall also be given by publication for three successive weeks in some newspaper of general circulation—published in the City of Des Moines, Iowa."

By the provisions of article 4 (p. 421), the annual meeting of the stockholders was fixed on the first Thursday of January of each year. At the annual meeting of the stockholders, held on January 3, 1890 (ex. 107, vol. IV, p. 1305), The Wabash Railroad Company and the Des Moines & St. Louis Railroad Company were present in the manner pointed out by the articles of incorporation, and nominated directors to represent those companies as provided by said articles.

Likewise, the Des Moines & Northwestern Railway Company and the Des Moines & Northern Railway Company were present and nominated directors representing those companies (p. 1306). At this meeting the following resolution was adopted (p. 1307):

"James F. How moved that the question of amending the Articles of Incorporation of this Company as well as the question concerning the issuing of stock for the *purchase price* of the terminal property be referred to Attorneys W. H. Blodgett & A. B. Cummins for their investigation and recommendation."

The meeting then adjourned to the 18th day of February, 1890. At this adjourned meeting on February 18, 1890, there were present in person F. M. Hubbell, L. M. Martin, F. C. Hubbell and A. B. Cummins, and by proxy G. M. Dodge, J. F. How, C. M. Hays and W. H. Blodgett. At this meeting the following record was made (ex. 109, vol. IV, p. 1311):

"The secretary reported that notice of the meeting had been duly published and also reported that he had, pursuant to the articles of incorporation, notified each stockholder of the time, place and object of this meeting, which notice contained the amendments proposed to be offered to the articles of incorporation.

Upon motion of A. B. Cummins the report of the Secretary was adopted and this meeting declared to be duly and legally called, for the purpose of considering and adopting or rejecting amendments to the Articles of Incorporation.

Thereupon A. B. Cummins presented certain amendments to the Articles of Incorporation.

Thereupon F. M. Hubbell moved that the meeting of stockholders do now adjourn for the pur-

pose of having further opportunity to examine said amendments, to meet on Tuesday, the 8th day of April, 1890, at ten o'clock a. m., which motion being seconded, was unanimously carried and thereupon the meeting of stockholders adjourned to meet as aforesaid."

The record of the second adjourned meeting of the stockholders of the defendant company, held on April 8, 1890, appears as plaintiff's exhibit 28 (commencing on p. 488, vol. II). A portion of said record is as follows (p. 489):

"There were present in person:

J. F. How,	representing One Share
C. M. Hays,	representing One Share
F. M. Hubbell,	representing One Share
L. M. Martin,	representing One Share
F. C. Hubbell,	representing One Share
A. B. Cummins,	representing One Share

There were present by proxy:

G. M. Dodge, by L. M. Martin, representing One Share.

W. H. Blodgett, by J. F. How, representing One Share.

There were also present the Des Moines & Northwestern Railway Company, successors to the Des Moines Northwestern Railway Company, by F. M. Hubbell, President.

The Des Moines & Northern Railway Company, successor to the St. Louis, Des Moines & Northern Railway Company, by A. B. Cummins, Vice-President.

The Des Moines & St. Louis Railroad Company by J. F. How, President.

J. F. How, President, presiding.

Thereupon, by an examination of the records and the books of the Company, it was determined that all the stockholders of said Company were

present either in person or by proxy duly filed with the Secretary of the Company."

The rule of law with reference to the presumptions indulged in favor of the recitations contained in a corporate record is so well settled that we do not need here to do more than call to the attention of the court the authorities cited in that portion of our brief devoted to this subject. Applying that rule to this record, it appears:

1. That this meeting was duly and legally called.
2. That due and legal notice of the proposal to amend the articles of incorporation of the defendant company, as the same appear to have been amended at this meeting, was given to all the stockholders of the company.
3. That all of the stockholders of the defendant company were present or represented at this meeting.
4. That the articles were amended as provided by the resolution passed at that meeting, and the officers and directors of the corporation were duly authorized to execute said amendments and give notice thereof as provided by the statutes of Iowa.

Other facts bearing upon the regularity of this meeting and the notice and knowledge of the stockholders with respect thereto, and the carrying out of the resolutions by the proper execution and filing of said amendments, will be referred to in the division of our brief relating to the acts of the parties under said amendments.

**THE ADOPTION OF THE AMENDMENTS AND RESOLUTIONS WERE ACTS OF THE STOCKHOLDERS (ACTS OF COMPLAINANTS' PREDECESSORS), AS DISTINGUISHED FROM THE ACTS OF THE DEFENDANT CORPORATION, AND THE COMPLAINANTS AND THEIR PREDECESSORS WERE BOUND THEREBY.**

It is the claim of petitioners, as we understand it, that even assuming the meeting of April 8, 1890, was properly called and organized, and that all the stockholders were present and represented, yet the act of amending the articles of incorporation was the act of the defendant corporation, and that the defendant could not thereby change the relations they claim therefore existed between their predecessors and the defendant company with respect to the property in question; that is, they say that by reason of the transactions which resulted in transferring the property in question to the defendant, the title of the defendant was merely that of a trustee for the benefit of their predecessors, who were the beneficial owners, and the defendant could not by this action affect the interest of *cestuis que trustent*.

The error in complainants' theory grows out of a misconception of the function and effect of the adoption of the amendments to the articles of incorporation and the failure to distinguish between the effect of the action of a corporation and the action of its stockholders. It is true, of course, that a corporation cannot by its own action affect its relations or contracts with third parties without the consent of such third parties, except in so far as such action may be urged by way of estoppel. But the acts of the stockholders of April 8,

1890, were not the corporate acts of the defendant company within the meaning of this rule. They were rather the acts of complainants' predecessors, who were the stockholders in defendant company and who, the complainants claim, owned the beneficial interest in the property. This thought must be perfectly clear when we come to consider the nature of articles of incorporation and the transactions of stockholders of a corporation.

When two or more persons get together to organize a corporation under the laws of Iowa, the act of such persons is their individual act and not at all the act of the corporation about to be organized. By adopting their articles they make a contract between themselves and between the corporation and themselves, and between the corporation and the state. In making this contract they reserve the power to amend these articles of incorporation; that is, they reserve the power to change the terms of this contract at their own volition and without consulting the corporate entity, and when they meet, as provided by the terms of their contract, and change the contract by amending the articles, such act is of their own volition and without consulting the corporate entity.

The rule with relation to the nature of articles of incorporation is laid down in

*Thompson on Corporations* (2d Ed.), Vol. 1, sec. 172,

as follows:

“Articles of association on the one hand may be said to constitute the contract of association between the stockholders, at the same time defining



the character and extent of the business in which the corporation shall engage, while on the other hand the general laws constitute the grant from the state, to those organizing the corporation, of the franchise or right of organizing the corporation and accomplishing the purposes agreed upon."

Again, the same authority, in section 312, lays down the rule:

"It is now universally conceded that the charter of a corporation is a contract. It is also very generally conceded that the charter is a contract in different aspects: (a) it is a contract between the state and the corporation; (b) between the state and the stockholders; (c) between the corporation and the stockholders; (d) between the state and third persons who have dealt with the corporation on the faith of the terms of the grant; (e) between the stockholders themselves."

In the case of

*Jones v. Electric Co.*, 144 Fed. 756 (C. C. A.).

Judge Sanborn lays down the rule as follows (p. 770):

"The relation of a stockholder to his corporation, to its officers and to his co-stockholders is one of contract and of confidence. By the acceptance of his shares of stock, he agrees to assume the liability and to discharge the duties imposed upon a stockholder by the law. The statutes, charter and the by-laws of the corporation, as well as the settled law of the land at the time he takes his stock are read into and become a part of his agreement. The provision of the statutes of Missouri that a manufacturing corporation might be consolidated with another corporation whose objects and business were of the same nature upon the consent of

three-fifths of the owners of its stock was a part of the agreement of the complainant and a consolidation made by the officers and owners of the requisite amount of the stock of his corporation by the faithful exercise of the powers thus granted was neither void in itself nor voidable at his option because it was but the performance of the agreement which he made with them."

The Supreme Court of Iowa, in the case of

*Heald v. Owen*, 79 Iowa 25,

lays down the rule:

"The articles of incorporation were adopted long before the indebtedness to the bank was contracted and the rights of the parties, as between themselves, were fixed by the articles of incorporation, at least from the time they were adopted by the association. The articles of incorporation were not recorded as required by section 1060 of the code and it is claimed that for this reason the stockholders are liable for the debts of the association. It is averred by the appellants that the articles of incorporation are of no validity whatever, but it is to be remembered that this is an action between stockholders. Their contractual relations as between themselves are to be found in what they adopted as their agreement. It was in writing and denominated 'articles of incorporation' and either signed or adopted by the stockholders."

Again the same court, in the case of

*Tracer v. Lucas Prospecting Co.*, 124 Iowa 112.

said:

"When a person becomes a shareholder in a corporation he assents to the transaction of the business expressly or impliedly authorized by its char-

ter and, therefore, if the charter authorizes the sale or other disposition of all of its property, he cannot complain."

Applying this rule to the case at bar, when the plaintiffs' predecessors organized the defendant, the Des Moines Union Railway Company, they entered into a contract between themselves, as well as with the corporation and with the state. By the terms of this contract the stockholders reserved the power to change the contract by means of changing the articles of incorporation in the manner pointed out in the articles themselves. By the act of the stockholders' meeting of April 8, 1890, the stockholders exercised this power to change the terms of this contract. They had the right to change the contract as between the stockholders themselves, as well as between the stockholders and the corporation, so long as such action did not conflict with any statutory provision of the state, and they had the right to do this without consulting the corporate entity, because such was the right obtained by the provisions of the original articles. The stockholders were bound by whatever changes they made in this contract, and by these changes in the contract they changed their existing relations with the corporation. It seems to us that the soundness of this proposition cannot be questioned.

Therefore, when they struck out article 2 of the original articles and adopted a new article 2, as shown by the record, they abandoned all that part of the original article 2 that was not contained in the substituted article, and therefore abandoned any claim with respect to the contract of January 2, 1882, which might have been made under the article as originally adopted; and by the adoption of articles 3 and 4 in place of the orig-

inal articles numbered the same, they abandoned any right to control the alienation of the property in controversy as provided in the original articles, and adopted a method of controlling the defendant corporation which consisted in requiring the election of directors to be made by a more than seven-eighths vote of the outstanding stock, and requiring that all major action of the board should be by unanimous vote; and by the adoption of articles 14 and 15 they ratified the purchase by the defendant of the property in controversy and abandoned any and all claims which could be made under the contract of January 2, 1882.

By the adoption of the resolutions appearing on pages 494 to 496 of volume II, these stockholders (complainants' predecessors) declared:

1. That the original agreement between them and the defendant corporation was that the defendant purchased the property in controversy "including the franchises incident thereto," at its fair value, payable partly in first mortgage bonds and partly in capital stock of the company.

2. That these bonds had been issued and received by the persons entitled thereto.

3. That there still remained to be paid the sum of \$400,000.00 upon said purchase price, which sum was to be paid in the capital stock of the defendant company.

4. They determined who was entitled to receive such capital stock.

5. That the articles of incorporation had been amended to conform to the true intent of the several parties.

6. They authorized the issuance of the capital stock which was to be issued as a part of the purchase price.

7. They modified and amended all prior proceedings so as to comply with the action at that time taken by the stockholders.

This action, as we have stated, was the action of the stockholders, the plaintiffs' predecessors. They had the right to make this contract changing the terms of the prior contract, and they had the right to do it without the assent of the defendant corporation, because they had reserved that right in the original contract. There was an adequate consideration for it and as we will hereafter show, they have ever since acted in pursuance of the amended contract (the amended articles of incorporation).

**THESE AMENDMENTS TO THE ARTICLES WERE PROPERLY SIGNED, ACKNOWLEDGED, RECORDED, AND NOTICE THEREOF WAS GIVEN AS REQUIRED BY THE IOWA STATUTE. THE COMPLAINANTS AND THEIR PREDECESSORS HAD BOTH ACTUAL AND CONSTRUCTIVE NOTICE THEREOF. THEY CARRIED ON THE BUSINESS OF THE DEFENDANT CORPORATION UNDER THESE AMENDMENTS FOR THE PERIOD OF SEVENTEEN YEARS BEFORE THE COMMENCEMENT OF THIS SUIT, AND ARE NOW ESTOPPED BY THEIR LACHES TO RAISE THE QUESTION OF THE VALIDITY OF THESE AMENDMENTS.**

We have already called to the attention of the court the corporate record in relation to these amendments.

and we will here content ourselves with referring to some of the evidence there is in the record showing both actual and constructive knowledge with respect to these amendments outside of the corporate record itself.

It will be remembered that at the annual meeting of the defendant company in January, 1890, the subject of the amendments was referred to Colonel Blodgett and to Mr. A. B. Cummins. The testimony of Mr. Cummins will be found commencing on page 1203 of volume III. The substance of his testimony on this subject is as follows (commencing p. 1206):

"I never heard any suggestion from anybody connected with the property or the proceedings, that the Des Moines Union Railway Company was not the owner of the property referred to. This, however, does not cover the suggestions that I myself made to persons who were interested in these companies concerning the title to the property at the time I was engaged in preparing certain amendments to the articles of incorporation, and before that time. My answer is intended only to relate to suggestions made by other persons with whom I was connected, than myself.

The suggestions I made began very soon after I became the counsel for the Des Moines Union Railway Company, and while I cannot recall the dates or places, I know that I made them at the meetings of the directors, meetings of the stockholders, and individually to everybody who was connected with the Des Moines Union Railway Company, or those companies which were then called the tenant companies. In order to answer the question intelligently, it seems to me it would be necessary for me to state the situation as I recall it, because that situation was the subject of repeated conferences and conversations with these

various representatives of these several companies.

In the first part of the year 1890, and before that but after I had become thoroughly familiar with the affairs of the Des Moines Union Railway Company, this is the way in which it was presented to me: First, as to the tenant companies, the Des Moines & St. Louis Railroad Company had practically passed out of existence. It was the owner of one-half of the capital stock of the Des Moines Union Railway Company at that time.

I am not pretending to repeat what I told the stockholders. I am stating the situation as it appeared then to me, and that situation I discussed with all the people connected with this company at various times, and it was that situation which led up to the proposition on my part to amend the articles of incorporation. I made that proposition, and the title to the property was one of the phases of the proposition. I have already said the Des Moines & St. Louis Railroad Company was practically out of existence. It was the nominal owner of one-half the capital stock in the Des Moines Union Railway Company, except as that title had passed to the Purchasing Committee of the Wabash, St. Louis & Pacific Railway Company; and the original articles of incorporation specifically provided that certain interests were to nominate a certain number each of directors. The Des Moines & Northwestern Railway Company had purchased of the Purchasing Committee a one-fourth interest in the stock of the Des Moines Union Railway Company. It was in trouble, that is to say, it was finding great difficulty in making its revenue meet its expenses. Nobody knew what was ahead for that company. The St. Louis, Des Moines & Northern Railway Company was also the owner, from the beginning, as I remember it, of one-fourth interest in the stock of

the Des Moines Union Company; it likewise was on the verge of bankruptcy. It was impossible to predict with any certainty what would become of it or its interest in the Des Moines Union Company, and this situation presented, as I thought, a very serious question.

I knew at that time that negotiations were pending between Mr. Hubbell and the Purchasing Committee for the purchase of a part of the one-half of the capital stock then held by the Purchasing Committee. The Purchasing Committee seemed to be anxious to dispose of a portion of this stock, and looking forward to the conduct of the Company in the future, it seemed to me that readjustment of that phase of the articles of incorporation I have referred to was absolutely necessary. More than that, it was discussed among all these people, that, inasmuch as the project of the union depot had been brought into existence, it was hoped that all the railroads in Des Moines could be brought into these terminals; that it would be very wise to have it so arranged that each railroad that might come into the depot in the future might become the owner of one-eighth of the capital stock. I thought that hope or expectation could never be realized without an amendment to the articles of incorporation, as it is evident that it could not be. Moreover, the original articles provided for a capital stock of one million dollars, and as I understood these articles, that stock was to be issued as a part of the purchase price of the property. The articles had been subsequently amended so as to increase the capital stock to two million dollars, and in that amendment it was specifically provided that the board of directors might receive in payment for this stock the property which had theretofore been conveyed—speaking of theretofore, at the time I made these suggestions to the Des Moines Union Railway Company.



I was always somewhat opposed to issuing capital stock without consideration and I did not believe that the property was worth any such amount and that to issue it in that way would impose, if disaster should come, a liability upon its owners, and would frustrate in a measure the hope of getting into this Des Moines Union Railway Company as stockholders as many of the railroads entering Des Moines as could be brought in. This was the standpoint as viewed, I thought, by the stockholders; but from the standpoint of the Des Moines Union Railway Company the situation was even more complicated and unsatisfactory.

And now I come to the specific answer to the question that was put to me. The Des Moines Union Railway Company was ignoring entirely, as it seemed to me, both as to ownership and as to management, the contract out of which the Des Moines Union Railway Company grew, namely, the contract of 1882. It had abandoned the terms of the contract as to the title of the property and as to the method of operation and management.

I am testifying to the substance of what I told these people and told all of them. The Des Moines Union was ignoring the articles of incorporation which in themselves, as I thought then and said then, were inconsistent with the contract of January, 1882. I told them that the contract provided for a title of the property in trust for the three companies which had signed it and for the joint use and occupation limited by Farnham Street in the west part of the city, and the company was claiming to own and operate a property extending to the west border of the city, and in the contract the Des Moines & St. Louis Railway Company, the company that had really no active functions, was charged with certain management and control of the property, and the other companies were required to pay to it whatever sums they were

obliged to pay for the use of the property. And furthermore, the contract and the articles seemed to contemplate in certain very important matters that there should be a formal preliminary approval by three independent companies before it could take action.

The substance of it was that I said that in view of the original articles, in view of the conveyances that had been made to the Des Moines Union Railway Company of the property which was originally in the names of Gen. Dodge and Mr. How, both individually and as trustee, and possibly some in the name of one of these other companies, or both of them, and that the Des Moines Union Railway Company had paid in its bonds for the original outlay for this property and had provided in its articles for the issuance of capital stock for the remainder of the purchase price, if any, that it was imperative to clear up the title and get rid of any question of doubt respecting the ownership of the Des Moines Union Railway Company and its right to manage its own property. These were the reasons which led up to my suggestion that there ought to be an amendment to the articles of incorporation that would put this company beyond any question in the ownership and control of its property just as any other corporation would be, leaving the interests which had been created in favor of the Des Moines & St. Louis Railroad Company and the Des Moines Northern Railway Company and the St. Louis, Des Moines & Northern Railway Company to be represented by the stock as in the case of other corporations, and the only suggestion that I ever heard from anybody in all my connection with any of these companies regarding the title to the property was the suggestion that I made myself arising out of the circumstances that I have stated.

I prepared a draft of the amended articles of incorporation that were finally adopted April 8, 1890, and I wrote Col. Blodgett the letter of date January 22, 1890. (This is the letter in which Col. Blodgett is advised that the stockholders of the terminal company had referred the question of amendments to Col. Blodgett and Mr. Cummins. See volume III, p. 1210.)

Prior to April 8, 1890, the draft of the amended articles of incorporation as it was afterwards adopted, was submitted to Col. Blodgett as the representative of the legal department of the Wabash interests, and I had a conference with him about it, and possibly more than one. I also discussed the matter with Mr. Hays (p. 311). I also wrote to Gen. Dodge about it in a letter dated January 27, 1890. (This is a letter in which Gen. Dodge was sent a copy of the proposed amendments, and in which it is stated that Mr. Hubbell was at first disposed to oppose the amendments. See p. 1211.)

These amendments were not suggested by Mr. Hubbell. They were entirely my own suggestion and came about in the way that I have already related. With regard to Mr. Hubbell's opposition, my recollection is that Mr. Hubbell—conservative then as now, never disposed to move very rapidly into the future—was opposed to my proposition, as I thought, without any good reason (p. 1212).

So far as I know, every interest in the terminal property concurred in and was in favor of the adoption of the amended articles before the meeting was held at which they were adopted. I was not aware of any opposition at all at that time. In fact, I knew that they had all consented to it. In connection with the proposed amendments I had prepared a resolution, or series of resolutions, carrying out my general proposition, which had been submitted to all, I believe, who were interested in

the matter and was understood to be a part of the thing to be done at the meeting just as we understood the amendments were to be adopted. I do not remember who suggested the exact amount of four hundred thousand dollars. I only know that I had suggested that it ought to be a great deal less amount than two million dollars and ought to be an amount that could fairly be said to represent, together with the bonds, the value of the Des Moines Union Railway Company property at the time the company was organized in 1884.

During the discussion that preceded this meeting and at this meeting there was no suggestion by anybody that the Des Moines Union Railway Company was not to acquire the absolute title for this property for which it was issuing this stock and these bonds. On the contrary, everybody there knew the very purpose, or one of the purposes, for adopting the amended articles of incorporation was to remove all doubt or any doubt on that subject and to abrogate the contract of 1882.

I prepared the preambles and resolutions at my own suggestion. I did it because it was the next step to be taken to clear up the matters that I was endeavoring to clear up in the amendment to the articles of incorporation. I recited that these people were present because they were present, and my understanding was that the eight directors and the three companies owned all of the capital stock of the Des Moines Union Railway Company. Neither of the Hubbells had anything to do with the preparation of the resolution, nor the incorporation of any part of it, unless it were to furnish me with the information that was necessary in order to draft it. I recall in this connection that between the time the resolution was passed for the preparation of amendments to the articles and this meeting to which you have just referred, the Purchasing Committee had sold a portion of the stock of the Des Moines Union Railway Company

to Mr. Hubbell and, as I remember it, a portion of it to General Dodge.

All of the persons who are recited to have been present upon that occasion had information from me with regard to the articles of incorporation, the amendments to the articles of incorporation and the resolution to which reference has been made, and in addition to those who were present, Col. Blodgett had information of these things from me, and General Dodge had information of these things from me, and my recollection is that Mr. Ashley also had information from me.

There was no attempt to conceal the transaction. On the other hand, as far as I was concerned, I made every possible effort that everybody connected with the whole matter should be fully and completely informed, and I drew the resolutions as specific as they are and as long as they are in order that there could be no possible controversy about it."

On cross examination Mr. Cummins testified on this subject (p. 1237):

"I suggested that the articles of incorporation should be amended months before I knew that Mr. Hubbell was negotiating for any stock or that he had any idea of buying any part of the stock, as I now recall it."

There is no testimony to contradict that of Senator Cummins as to the manner in which the subject of the articles arose and the publicity of the matter, or as to the fact that everybody was consulted and thoroughly informed with respect thereto, but on the contrary all the evidence corroborates his testimony.

There are a few other significant facts shown by the record to corroborate the theory that the stockholders

and parties interested in the corporate affairs of the terminal company had proper notice of the proposed amendments to the articles of incorporation and consented thereto and acquiesced therein.

It will be noted that article 4 of the original articles of incorporation of the terminal company (exs. 5½ and 6, vol. II, p. 421), which provides for the election of directors, contained the following provisions:

“Four members of the Board shall be nominated by the Wabash, St. Louis & Pacific Railway Company, two members by the Des Moines Northwestern Railway Company and two members by the St. Louis, Des Moines & Northern Railway Company, and no stockholders shall be eligible for membership of the Board unless so nominated.

The fact that a candidate has been duly nominated shall be certified to the Stockholders' meeting of this Company by the Secretary of one of the respective companies aforesaid and such certification shall be conclusive.”

This is a very peculiar and unusual provision in relation to the election of directors. It appears that the first meeting of the stockholders of the terminal company for the purpose of electing directors, so far as is shown by the record, was on March 31, 1888 (ex. 26, vol. II, p. 476). At this meeting James F. How nominated four directors on behalf of the Wabash Company and the Des Moines & St. Louis Railroad Company and the Wabash Western Railway Company; F. M. Hubbell nominated directors on behalf of the Des Moines Northwestern Railway Company, and G. M. Dodge nominated directors on behalf of the St. Louis, Des Moines & Northern Railway Company. These directors so nominated were elected.

The next annual meeting of the stockholders of the terminal company was held on January 8, 1889, and a like proceeding was had; A. B. Cummins nominated four directors on behalf of the Wabash Company and the Wabash Western Railway Company; Mr. Hubbell nominated two directors on behalf of the Des Moines & Northwestern Railway Company, and L. M. Martin nominated two directors on behalf of the St. Louis, Des Moines & Northern Railway Company (ex. 106, vol. IV, p. 1304).

At the next annual meeting of the stockholders of the terminal company, held January 3, 1890 (ex. 107, vol. IV, p. 1305), a like proceeding was had.

We quote from the record as follows:

“ \* \* \* J. F. How on behalf of the Wabash Railroad Company operating the Des Moines & St. Louis Railroad Company, nominated Jas. F. How, C. M. Hays, W. H. Blodgett and A. B. Cummins to be voted for as directors of the Des Moines Union Railway Company to represent the said Wabash Railroad Company, it having been certified to this meeting by the Secretary of the Wabash Railroad Company and Des Moines & St. Louis Railroad Company that the above named gentlemen had been duly nominated as candidates for directors in this Company on behalf of the Wabash Railroad Company, and the Des Moines & St. Louis Railroad Company.”

A like record was made with respect to nominations by G. M. Dodge on behalf of the Des Moines & Northern Railway Company and by F. M. Hubbell on behalf of the Des Moines & Northwestern Railway Company.

It will, therefore, be noted that down to this time this peculiar method of nominating directors was followed.

The amendments to the articles of incorporation of the terminal company adopted April 8, 1890, changed the method of nominating directors and provided the usual method in that respect. (See article 4 of the amendments to the articles of incorporation, ex. 303, vol. IV, p. 1604.)

At the next annual meeting of the stockholders of the terminal company, held February 11, 1891 (ex. 115, vol. IV, p. 1318), no certificates of these various railroads were presented certifying the nomination for directors as was required by the original articles, but the various stockholders appeared in person or by proxy and the directors were elected as they are ordinarily elected at corporate meetings. At no time after the annual meeting, held on January 3, 1890, were any certificates of the secretaries of these railway companies presented certifying the nomination of directors as provided for in the original articles, but on the contrary at all meetings after that the ordinary and usual method was followed as provided in the amendments. The necessary conclusion from this is that all the railroads and all the stockholders knew of and acquiesced in and ratified the amendments to the articles of incorporation.

Again, as we have already shown, the Des Moines & St. Louis Railroad Company had authorized that portion of the stock that was coming to that company to be issued to the Purchasing Committee of the Wabash, St. Louis & Pacific Railway Company, which, upon acceptance of the stock, or acquiescence there in by the Purchasing Committee, constituted such Purchasing Committee stockholders in this company. It will be remem-



bered that prior to the adoption of these amendments to the articles, Mr. Hubbell and General Dodge had bought of the Purchasing Committee each one-eighth of the capital stock of the terminal company. One of the agreements in connection with this purchase (ex. 300, vol. IV, p. 1601), was that the articles of incorporation should be so amended as to permit one director of the terminal company to be nominated by any person or corporation holding one-eighth of the stock. At this time Colonel Blodgett was one of the directors nominated by the Wabash interests as representing it (ex. 197, vol. IV, p. 1306). At the conclusion of the meeting of April 8, 1890, at which the articles of incorporation were amended (ex. 28, vol. II, p. 496), the resignation of Colonel Blodgett as director was accepted and Mr. H. D. Thompson, a brother-in-law of Mr. Hubbell, was elected to fill his place. Undoubtedly this was done in pursuance of the agreement entered into with the Purchasing Committee, as heretofore stated, at the time it sold this stock to Mr. Hubbell and to General Dodge, and the necessary inference is that the Purchasing Committee was advised of this meeting, its purpose, and that the resignation of Colonel Blodgett was presented at the suggestion of such committee.

Again it is shown by complainants' testimony that Mr. How and Mr. Hays, both of whom were present at the meeting and voted for the adoption of these amendments, represented the Wabash interests, whatever they were (vol. II, p. 242).

Again it will be remembered that the authorized capital stock of the terminal company was \$1,000,000.00, which was raised to \$2,000,000.00 by an amendment adopted November 1, 1887 (vol. IV, p. 1298).

By the resolutions of January, 1885, and November, 1887, by which the transfer of the property to the terminal company was authorized, it was provided that as a part of the purchase price there should be issued all of the defendant's capital stock.

At a meeting of the board of directors of the Des Moines & St. Louis Railroad Company, held on April 8, 1890 (the same day on which the articles of the defendant company were amended), and at which were present James F. How, C. M. Hays, A. B. Cummins, F. M. Hubbell, H. S. Priest and George S. Grover, all of whom, except Mr. Hubbell, were either officers or attorneys of the Wabash Company, the following proceedings were had (ex. 185, vol. IV, p. 1434):

“C. M. Hays offered the following resolution and moved its adoption:

Whereas, the purchasing committee of the Wabash, St. Louis & Pacific Railway Company has sold to F. M. Hubbell one-eighth and to G. M. Dodge one-eighth of the stock of the Des Moines Union Railway Company, and

Whereas, the entire capital stock of said company owned by the company, issued as a part of the purchase price thereof, has been fixed at Four Hundred Thousand Dollars,

It is therefore now

Resolved, that the said sale by the said Purchasing Committee be and the same is hereby ratified, confirmed and approved by the Des Moines & St. Louis Railroad Company.”

How did the Des Moines & St. Louis Railroad Company ascertain that that portion of the purchase price of the terminal property which was to be paid in defendant's capital stock had been fixed at \$400,000.00? All of the proceedings prior to April 8, 1890, had pro-

vided that the capital stock to be issued in part payment of the purchase price was the full capital stock authorized by the defendant to be issued, which was originally \$1,000,000.00, and subsequently \$2,000,000.00. The only place where it was fixed at \$400,000.00 was at the meeting of the stockholders of the defendant company, held on April 8, 1890, and it must have been from this record that the Des Moines & St. Louis Company ascertained this fact. It therefore necessarily follows that the Des Moines & St. Louis Railroad Company had knowledge of the proceedings of the stockholders of the defendant company on April 8, 1890, by which the articles of the defendant company were amended, and the amount of the capital stock to be issued in part payment for the property was fixed at \$400,000.00.

On the same day there was issued to the Purchasing Committee of the Wabash Company, 1,000 shares of stock of the defendant company (less two shares of stock, standing in the name of directors), (ex. 79, vol. II, p. 711).

Bearing in mind that the resolutions of November, 1887, authorized the issuance to the Purchasing Committee of 15,000 shares of stock of the defendant company as a part of the purchase price, of what was the Purchasing Committee put upon its inquiry when it received this 1,000 shares of stock? This was adequate notice to the Purchasing Committee that some change had been made in the plan and it was up to the Purchasing Committee to make inquiry, and if it had done so it would have discovered the action of April 8, 1890, if it didn't already know about it.

At the annual meeting of the stockholders of the Des Moines Union Railway Company held February 11,

1891, which was the first annual meeting after the adoption of the amendments of April 8, 1890, there were present G. M. Dodge, James F. How, C. M. Hays, F. M. Hubbel, L. M. Martin, F. C. Hubbell and A. B. Cummins, all in person, and the Purchasing Committee of the Wabash Company by James F. How, proxy, the Des Moines & Northwestern Railway Company by F. C. Hubbell, vice-president, and the Des Moines & Northern Railway Company by G. M. Dodge, president (ex. 115, vol. IV, pp. 1318-9). At this meeting the following proceedings were had:

"The President stated the first business of the meeting to be the reading of the minutes of the previous meeting of the stockholders held during the year 1890, and the minutes of the directors' meetings and of the Executive Committee, and thereupon called upon the Secretary to read the same, which was done.

Mr. A. B. Cummins moved that the proceedings of the stockholders' meeting and the meetings of the board of directors and of the Executive Committee be approved. The motion was seconded and carried."

It will be remembered that certificates of stock had been issued prior to this meeting.

There was no controversy but that plaintiffs' predecessors were present at this meeting by their proper representatives, so at this time they were all advised of the amendments to the articles of incorporation of April 8, 1890, and the action was formally approved. An examination of the corporate records of the defendant company will disclose that from April 8, 1890, down to the time of the commencement of this suit the business of the defendant company was carried on under

the amendments of April 8, 1890, and no question was ever raised about their validity. (See vol. IV, commencing p. 1314.)

The amendments to the articles of incorporation as adopted April 8, 1890, appear as defendants' exhibit 303 (vol. IV, pp. 1604-10). They were signed and acknowledged by F. M. Hubbell, F. C. Hubbell, A. B. Cummins, Horace Seeley, L. M. Martin, Charles M. Hays, James F. How, Wells H. Blodgett, G. M. Dodge and H. D. Thompson (p. 1604), and were filed for record in the office of the county recorder of Polk County, Iowa, on April 23, 1890, and in the office of the secretary of state on May 12, 1890 (p. 1610), as required by the statute of Iowa.

Notice of these amendments was properly published as required by the statutes of Iowa (chs. 614-5, vol. IV, pp. 2010-1).

By chapter 88 of the acts of the twenty-second General Assembly (1888), in force on April 8, 1890, it was provided:

"That any of the provisions of the Articles of Incorporation may be changed at any annual meeting of the stockholders or special meeting called for that purpose; but said changes shall not be valid unless recorded and published as the original articles are required to be; and said changes in the Articles need only be signed and acknowledged by the officers of said Corporation."

By chapter 23 of the laws of the seventeenth General Assembly (1878), in force on April 8, 1890, it was provided:

"Previous to commencing any business, except that of their own organization, they must adopt articles of incorporation, which must be signed and

acknowledged by the incorporators, and recorded in the office of the recorder of deeds of the county where the principal place of business is to be, in a book kept therefor; the recorder must record such articles as aforesaid, within five days after the same are filed in his office, and certify thereon the time when the same was filed in his office, and the book and page where the record thereof will be found. The said articles and certificate of recorder shall be then recorded in the office of secretary of state, in a book kept for that purpose."

Section 1613 of the code of 1897 was in force on April 8, 1890, and provided for the publication of notice of the adoption of the articles of incorporation.

The purpose of this statute is to give to the world (which includes the stockholders), notice of the articles of incorporation and amendments thereto.

In the case of

*Dempster v. Downs*, 126 Iowa, 80,

the Court said:

"Every one who acquires certificates of stock must be assumed to know that they were issued by virtue of articles of incorporation, and that these may be found in the office of the Secretary of State. Indeed, the very object of requiring the filing and recording of the articles is to give them the same publicity, as nearly as may be, as statutory charters, and render them easily accessible to all who may be interested in ascertaining their contents. These articles are expressive of the relative obligations of the company and stockholders, and inhere in the certificates of stock, in whosoever hands they may come."

If the provisions of the articles of incorporation and amendments stand upon the same basis and must be taken notice of by all the world, including the transferees of the stock, certainly the filing, recording and giving notice of the amendments is constructive notice of the provisions thereof to all stockholders.

In passing, we may call the court's attention to the fact that petitioners required their stock and whatever interest they have in this property long after the adoption of these amendments, and, therefore, come squarely within the doctrine of the above case, but of this we will have more to say at a later time.

Not only does the record show that complainants and their predecessors had actual and constructive notice of these amendments to the articles, but it is a presumption of law that all stockholders assent to any change in the articles of incorporation.

*Holmes v. Loan Assn.*, 107 S. W. (Mo.) 1005.

*Cook on Corporations*, (6th Ed.) Vol. 2, sec. 503.

### **THE PUBLICATION OF THE AMENDMENTS.**

The objection made by counsel to the sufficiency of the published notice of the Amendments is without validity. The Statute of Iowa, Code of 1897, Sec. 1613, requires the published notice of incorporation to show,

1. The name of the corporation and its principal place of business.
2. The general nature of the business to be transacted.
3. The amount of capital stock authorized and the times and conditions on which it is to be paid in.

4. The time of the commencement and termination of the corporation.

5. By what officers or persons its affairs are to be conducted, and the time when and manner in which they will be elected.

6. The highest amount of indebtedness to which it is at any time to subject itself.

7. Whether private property is to be exempt from corporate debts.

Sec. 1615 requires amendments to be published "as the original articles are required to be."

Article two of the Articles of Incorporation of the Des Moines Union, both original and as amended comes under the second head of Section 1613, "the general nature of the business to be transacted." As to this there was no change. It was and continued to be that of a terminal railway. The allusion to the contract of 1882 did not affect this. And this was expressly decided by the Supreme Court of Iowa in *Morgan vs. Des Moines Union Ry. Co.*, 113 Iowa 561. The Court, *l. c.* 565, said:

"That defendant was incorporated under the general law is made apparent by the terms of its articles of which the following is a part: Art. II. The general nature of the business to be transacted shall be the construction, ownership and operation of a railway in, around and about the City of Des Moines, Iowa, including the construction, ownership and use of the depots, freight houses, railway shops, repair shops, stock yards, and whatever else may be useful and convenient for the operation of railways at the terminal point of Des Moines, Iowa, as well as the transfer of cars



from the line or depot of one railway to another, or from the various manufactories, warehouses, storehouses, or elevators to each other, or to any of the railways or depots thereof now constructed or to be hereafter constructed in or around the City of Des Moines, and such corporation shall possess all the powers conferred upon corporations for pecuniary profit by Chapter I of title IX of the Code and the amendments thereto." These articles were afterward amended, *but in no way was the language set out qualified in the amendment.*"

Counsel cite this case as if it held that the attempted amendment failed because of insufficient publication. But the Court decided nothing of the kind. It decided that the Amendment which was made, one by elimination of a mere solecism, did not qualify "the general nature of the business to be transacted," so that it was, not less than it had been, "a railway corporation" with all the powers of such a corporation. So under paragraph 2 of Section 1613 of the Code there was nothing to be published. The reference to the agreement was an incongruity, an obsolete thing recognized as such by the parties and as such removed from the articles.

In *Thornton vs. Baleon*, 85 Ia. 198, the articles provided as to the total of indebtedness of the corporation that it "shall not at any time exceed three hundred dollars, except by a majority vote of the stockholders present at a called or annual meeting." The published notice declared simply that "the indebtedness of the company shall not exceed three hundred dollars at any one time." The Court, *l. c.* 201, said:

“It is claimed that this is not a true statement of the amount of the authorized indebtedness. It appears to us that it is just such a statement as the law required. It was the amount of indebtedness then authorized, and it was wholly unnecessary to publish the manner in which the limit of indebtedness might thereafter be increased or diminished.”

The statutes of Iowa do not require publication of the articles in full, nor even of a summary of them, but only the seven enumerated points, or the substance of them. And so as to amendments. Everything enumerated in them and affected by the amendments was contained in the notice. There was much in the amendments which had no place in the notice. And so it was as to the reference to the 1882 agreement. It would be a veracious bull to say that as to this silence was the only statement required.

As between the stockholders, it was not necessary that any publication should be made. They had notice. They knew what had been done, for they participated in making the amendments and acted under them for years.

*Heald v. Owen*, 79 Iowa 95.

### **A DISSENTING STOCKHOLDER MUST ACT PROMPTLY.**

If the complainants have any standing in this court to question the validity of the amendments of April 8, 1890, it must be in their capacity as stockholders of the defendant company. The question of the validity of a corporate action of this kind cannot be raised by one having merely contractual relations with it, but can only be raised by a stockholder or the state.

The general rule is laid down by

*Cook on Corporations* (6th Ed.), Vol. 2, sec. 503,

as follows :

“A stockholder may be estopped from objecting to an amendment by his express or implied acquiescence therein. Any acts indicating an acceptance by him of the amendment bind him and bar his suit. Acquiescence may sometimes grow out of his silence or delay under circumstances that called on him to dissent if he so intended. A court of equity will go far to aid a dissenting stockholder where he applies promptly and before large investments and many changes are made on the faith of the acts complained of. But laches will not be tolerated by the court, especially where important interests are involved.”

In the case of

*Rabe v. Dunlap*, 25 Atl. (N. J.) 959, the suit was

to invalidate a consolidation of two companies because beyond their corporate powers. The Court said (p. 961) :

“The stockholders of a corporation have an indisputable right to have the property of the corporation applied and used exclusively for the purpose specified in its charter, and any attempt by its managers to appropriate it to any other purpose is a usurpation of power and a violation of the rights of the stockholders. \* \* \* But stockholders, to be entitled to the summary interference of the court in cases where they seek protection against acts which are merely in excess of the power of the corporation, and are not prohibited by law, must be diligent. They must apply so recently after the doing of the act of which they complain

that the court may stop or undo the wrong to them without doing equal or greater wrong to some other person. The principle which must control the action of a court of equity in cases where the defense is laches was laid down by Lord Camden, many years ago in these words: 'Nothing can call forth the activity of a court of equity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of his jurisdiction, there was always a limitation to suits in equity.' \* \* \*

Or, stated with greater brevity, and in its simple essence, the rule is this: If he wants protection against the consequences of an *ultra vires* act, he must act for it with sufficient promptness to enable the court to do justice to him without doing injustice to others."

The general rule is laid down by Circuit Court Judge Lurton, in an opinion in the Circuit Court of Appeals, Sixth Circuit, in the case of

*Synnott v. Cumberland Bldg. Assn.*, 117 Fed. 379 (C. C. A.),

in which case it was claimed that the action complained of was invalid, so far as complainant was concerned, because complainant's proxy in voting at the stockholders' meeting exceeded his power as expressed in the proxy.

Referring to the question under consideration, Justice Lurton said (p. 385):

"We deem it unnecessary to express any opinion as to the conclusive effect upon Mrs. Synnott of the action of Hayward in participating in the

doing of business not included in the notice for the adjourned meeting, because we are of the opinion that whether her agent could waive the sufficiency of the notice of the business undertaking at that meeting or not, nothing but the most active diligence in repudiating what was there done in her name and by her apparent consent can void the consequences of her agent's action. That action was held on January 17, 1898. This bill was filed May 1, 1899. For more than a year no protest was made to the action of her agent, and, indeed, the bill filed contains no word of complaint that he had exceeded his authority or that the meeting had exceeded the notice or call made for it.

An effort has been made to excuse Mrs. Synnott for her inaction by the claim that she did not know of the action taken at the January meeting until shortly before her bill was filed. Mrs. Synnott does not testify at all. Her husband says he acted for her in looking after her stock. He states that he cannot say definitely when he got the information as to what had been done, but thinks it was several months afterward. Mr. Synnott was an old and expert building and loan man, and though he lived in another state, it is hardly credible to suppose that he long remained in ignorance of so important and public an action as that affecting this common stock.

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It will not do to say that no change occurred in the attitude of the company between that action and the filing of the bill. We may take notice that the shares in such companies are constantly changing hands, and new shares being issued at short periods, constituting new series of stock. It may well be presumed that the elimination of the special powers of this common stock by the apparent consent of the stockholders would be an important

factor in all the future issues of new stocks and sales of old. Mrs. Synnott should have actively repudiated what was apparently done for her. Until she did so every one had a right to suppose that she had agreed to permit her shares to stand upon a plane of equality with other prepaid shares of what is called installment stock and to act upon that theory."

The rule is laid down in the case of

*Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co.*, 127 Fed. 625 (C. C. A.)

as follows (p. 629) :

"\* \* \* The stockholders must be charged with such knowledge as would have come to them in the exercise of due diligence and attention to their business interests, and in this case to business interests of very large magnitude."

In the case of

*Thompson v. Lambert*, 44 Iowa 239,

complaint was made of the act of an agricultural association in making a donation to a railroad company. Complainants Thompson and Cressler were not present at the meeting at which the donation was authorized, but knew that such was being discussed.

With respect to the promptness with which they should have acted, the court said (p. 247) :

"Under these circumstances we are of the opinion that Thompson and Cressler had sufficient knowledge to put them on an inquiry. They knew it was proposed in some way to have the Agricultural Society aid in building the railway, and in-

quiry prosecuted with diligence and a fair degree of earnestness to obtain information, would have developed the fact as to the proposal to guarantee the notes and execute the mortgage. There is nothing tending to show there was any secrecy intended, nor was the proposition in any manner concealed. But knowing the matter was talked about and canvassed, Thompson and Cressler did nothing to prevent the consummation of the claimed illegal act, and to which they were opposed until the commencement of this action in December, 1872. They had sufficient knowledge of what was proposed to be done to warrant them in applying for an injunction as early as March, 1871, and had they done so before the loan was effected, their standing and the question for determination would have been very different.

The stockholder of a corporation who seeks to prevent the consummation of an illegal corporate act, or to avoid it, should be swift to make known his desires and assert his rights through the tribunals appointed for that purpose."

The Supreme Court of the United States in one case (*Foster v. Mansfield, etc., R. Co.*, 146 U. S. 88), has laid down the rule as follows (p. 96):

"The bill in this case was dismissed in the court below upon the ground of laches, and also for want of equity. \* \* \*

As the alleged fraudulent sale of this road, which constitutes the gravamen of the bill, took place August 28, 1877, and the bill was not filed until August 30, 1887, ten years thereafter, there is certainly a presumption of laches, which it is incumbent upon the plaintiff to rebut. His reply is that he did not discover the fraud until a few months before the filing of the bill. \* \* \*

The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts. Especially is this the case where the party complaining is a resident of the neighborhood in which the fraud is alleged to have taken place, and the subject of such fraud is a railroad with whose ownership and management the public, and certainly the stockholders, may be presumed to have some familiarity."

It appears, therefore,

*First.* That the presumption is that all the stockholders had notice of this meeting at which the articles of incorporation were amended and had a copy of the proposed amendments.

*Second.* That the recitals contained in the minutes of the meeting are presumptively correct, and, therefore, that the stockholders had notice of the meeting and the proposed amendments and that they were all represented in person or by proxy.

*Third.* It is presumed that all stockholders consented to the enactment of the amendments and acquiesced therein.

*Fourth.* The filing, recording and giving notice of the amendments as provided by statute, is notice to the world of such amendments.

*Fifth.* That the stockholders are charged with notice of everything which they might have learned by the



exercise of reasonable diligence, and that in order to challenge the validity of these amendments it was necessary for them to act promptly, or, as the Supreme Court of Iowa put it, "*swiftly*."

For more than seventeen years the defendant company, its officers, directors and stockholders (including complainants and their predecessors) acted under these amendments and acquiesced therein and no question was ever raised about their validity until the commencement of this suit. Certainly the complainants are far from having acted "*swiftly*" as they were required to by the rules of law above set out.

**COMPLAINANTS ARE NOT IN A POSITION TO COMPLAIN OF THESE AMENDMENTS, BECAUSE THEY ACQUIRED THEIR STOCK AND WHATEVER INTEREST THEY HAVE IN THE TERMINAL COMPANY, SUBSEQUENT TO THE ENACTMENT OF THE SAME AND AFTER THE SAME WERE FILED, RECORDED AND PUBLISHED, AS REQUIRED BY STATUTE.**

So far as the Wabash is concerned, the interest which it now claims to have in the property in controversy belonged originally either to the Des Moines & St. Louis Railroad Company or to the Wabash, St. Louis & Pacific Railway Company, and for the purposes of this proposition it doesn't matter which.

On the 25th day of April, 1888, the Wabash, St. Louis & Pacific Railway Company transferred to James F. Joy, Ossian D. Ashley, Edgar T. Welles and Thomas H. Hubbard, known as the Purchasing Committee, all its property (ex. 45, vol. II, p. 536). After describing the specific property, this deed by its terms (p. 540) in-

cludes "also all the property, rights, interests and choses in action acquired by said Wabash Railroad Company after June 1st, 1880, whether hereinbefore described or not." This would be sufficient to transfer to the Purchasing Committee whatever rights the Wabash, St. Louis & Pacific Railway Company had in the property in controversy.

As we have heretofore shown, the Des Moines & St. Louis Railroad Company authorized the issuance of its share of the stock to the Purchasing Committee and all the parties recognized the title of the Purchasing Committee to the stock.

On June 1, 1899, about nine years after the amendments to the articles of incorporation, the Des Moines & St. Louis Railroad Company transferred to the complainant, The Wabash Company, all the property of the first named company (ex. 44, vol. II, p. 533), and included in the deed is the following:

"does grant, bargain, sell, assign and set over unto the Wabash Railroad Company, its successors and assigns forever, all of its said line of railroad and right of way as the same now is, or may be hereafter constructed, or acquired in said State of Iowa, commencing at a point in or near the City of Des Moines, *where said road connects with the tracks of the Des Moines Union Railway Company*, and extending from thence \* \* \* to the town or city of Albia in Monroe County, \* \* \* and all its rights, privileges and franchises and all other things, real and personal, now owned, or used, or that may be hereafter owned or used by the party of the first part in connection with the line of railroad above described and herein and hereby granted, *and especially including all the rights and leasehold and other interests of the first party under a contract dated May 10th, 1889, between the*

*Des Moines Union Railway Company of the first part and the Des Moines and St. Louis Railroad Company, the Des Moines and Northwestern Railway Company, and the St. Louis, Des Moines and Northern Railway Company, of the second part."*

Whatever interest in the property in controversy was acquired by the complainant, The Wabash Company, from the Des Moines & St. Louis Railroad Company was acquired by virtue of this deed. On August 18, 1898, the Purchasing Committee transferred to The Wabash Company, all the property acquired and then owned by the Purchasing Committee. Whatever interest the complainant, The Wabash Company, acquired from the Purchasing Committee in the property in controversy was acquired by virtue of this deed and by the transfer of the stock of the terminal company to the Continental Trust Company on March 23, 1899, which latter company held the same as security for the indebtedness of the Wabash Company.

On the 1st day of May, 1899, Chicago, Milwaukee & St. Paul Railway Company acquired from the Des Moines, Northern & Western Railroad Company (ex. 74, vol. II, p. 673), its interest in the property in controversy, which is described (p. 675) "*and also a one-fourth interest in the capital stock of the Des Moines Union Railway Company.*"

It appears, therefore, that for a period of about nine years complainants' predecessors acted under the articles of incorporation of the terminal company, as amended on April 8, 1890, and that complainants for another period of eight years after acquiring their interest in the stock, themselves acted under said articles before they brought this suit.

The ninety-fourth equity rule provides as follows:

"Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

This rule is carried forward in substantially the same language as equity rule number twenty-seven, taking effect February 1, 1913.

This proceeding, so far as it relates to the validity of the amendments to the articles of incorporation of April 8, 1890, is a proceeding by the stockholders of the terminal company founded on alleged rights which may properly be asserted by the corporation, that is, the stockholders in the terminal company having the power to amend the articles of incorporation, have the power to repeal such amendments or to declare them invalid and of no effect, if such is true. The proper forum to which the complainants should make their first appeal is the annual meeting of the stockholders. This has never been done, although seventeen such annual meetings were held subsequent to the adoption of the amendments and before the commencement of this suit. During all these years the subject of the validity of

these amendments never seems to have been mentioned by any one to any one, or to have been thought of by any one until the value of this property became so great as to excite the cupidity of complainants.

The purpose of the enactment of the rule was twofold: *first*, to prevent collusive suits being brought in the United States courts, and, *second*, to establish the equitable rule of law that one who has bought into a corporation may not complain of the acts of the corporation prior thereto, because he bought with actual or constructive knowledge of the situation, and because any other rule might permit a holder of stock to challenge the act of the corporation even though his stock had been voted in favor of such act.

The second reason for the rule above indicated applies with twofold force when we come to consider the validity of the amendments to the articles of incorporation enacted prior to the acquisition of the stock by complainants. In the first place, the amendments having been executed, acknowledged, recorded, and notice having been given as provided by law, subsequent stockholders have constructive notice of the amendments; and in the second place, complainants do not claim to have been deceived with respect to these amendments or to have been ignorant of them. Under these circumstances, it seems to us that with respect to this particular issue complainants come squarely within the terms of equity rule XCIV, for both of the reasons suggested, and for this reason if for no other they are not entitled to relief with respect to these amendments.

### III.

THE COMPLAINANTS ARE ESTOPPED FROM ASSERTING THAT THE OWNERSHIP OF THE TERMINAL PROPERTY IS NOT VESTED ABSOLUTELY IN THE DES MOINES UNION RAILWAY COMPANY, AND FROM CLAIMING THAT THE STOCK OF THE COMPANY HELD BY THE DEFENDANT, F. M. HUBBELL & SON, DOES NOT REPRESENT A VALUABLE INTEREST THEREIN.

As we have heretofore indicated, the real purpose of this suit is to secure a decree which will make the capital stock held by the defendant, F. M. Hubbell & Son, of no value. If the complainants owned all the stock in the defendant company, then the question of whether it had a perfect title to the terminal property would be of no importance, because in either event the complainants would own the beneficial interest. Therefore, they seek a decree which will give them a direct interest in the property and which would destroy the value of the stock.

The doctrine of equitable estoppel is well settled in the courts of the United States and in the State of Iowa, as well as in other courts of last resort. In order to meet the rule, the following facts must appear:

1. Representations, either active or passive, on the part of the persons against whom the rule is sought to be enforced.
2. A reliance upon such representations by the person or persons in whose favor the doctrine is invoked.

3. Acts of such persons resulting in changing their position.

In the

*Encyclopedia of the U. S. Supreme Court Rep.*,  
Vol. 5, p. 939,

the editor of that work refers to the principle as follows:

"The principle of estoppel *in pais* or by the act of the party is an important one in the administration of the law. It is founded in reason and justice and in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is available only for protection, and cannot be used as a weapon of assault. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice where nothing else known to our jurisprudence can, by its operation, save them from defeat or secure those ends. It is akin to the principle involved in the limitation of actions, and does its work of justice and repose where the statute cannot be invoked."

In the case of

*Morgan v. Railway Co.*, 96 U. S. 716,

the court lays down the rule as follows (p. 720):

"The appellee insists that the record discloses a case of estoppel *in pais*, and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation. The principle is an important one in the administration of the law. It not infrequently gives triumph to right and justice where nothing else could save

them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights, when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. *The Bank of the United States vs. Lee*, 13 Pet. 107.

He is not permitted to deny a state of things which by his culpable silence or misrepresentations he had led another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. *Merchants' Bank vs. State Bank*, 10 Wall. 604."

In the case of

*Kirk v. Hamilton*, 102 U. S. 68,

the court says (p. 75):

"In the view we take of the case, it is unnecessary to pass upon these several objections. If it be assumed that the record of the suit of *Moore & Co. vs. Kirk, etc.*, was, of itself, insufficient in law to divest Kirk of title to the premises in dispute, or to invest Hamilton with title, the question still remains, whether the facts disclosed by the first bill of exceptions do not constitute a defense to the present action.

After the confirmation of the sale of April 19, 1864, before any deed had been made, and while the cause was upon reference for a statement, as well of the trustee's account as for distribution of the fund realized by the sales, Kirk it seems, appeared before the auditor, by an attorney, and made objection to the allowance of the simple-contract debts which had been proven against him in his absence. So far as the record discloses, no other objection to the proceedings was interposed



by him. Undoubtedly, he then knew, he must be conclusively presumed to have known, after he appeared before the auditor, all that had taken place in that suit during his absence from the District, including the sale of the premises in dispute, which took place only a few months prior to his appearance before the auditor. If that sale was a nullity, the court, upon application by Kirk, after his appearance before the auditor, could have disregarded all that had been done subsequently to the first sale, discharged Hamilton's bond, returned the money he had paid, and, in addition, placed Kirk in the actual possession of the property. No such application was made. No such claim was asserted. No effort was made by him to prevent the execution of a deed to the purchaser at the second sale. So far as the record shows, he seemed to have acquiesced in what had been done in his absence. In 1868, three years after his return to the city, and two years after Hamilton had secured a deed in pursuance of his purchase he became aware that Hamilton was in actual possession of the premises, claiming and improving them as his property. He personally knew of Hamilton's expenditures of money in their improvement, and remained silent as to any claim of his own. Indeed, his assertion while the improvements were being made, of claim to only three feet of ground next to the adjoining lot upon which he resided, was in effect, a disclaimer that he had, or would assert, a claim to the remainder of the lots 7 and 9 which Hamilton had purchased at the sale in April, 1864. and his subsequent declaration that he was in error in claiming even that three feet of ground, only added force to his former disclaimer of title in the premises. Hamilton was in possession under an apparent title acquired, as we must assume from the record, in entire good faith, by what he supposed to be a valid judicial sale, under the sanction of a court of general jurisdiction.

The only serious question upon this branch of the case is whether, consistently with the authorities, the defense is available to Hamilton in this action of ejectment to recover the possession of the property. We are of opinion that the present case comes within the reasons upon which rest the established exceptions to the general rule that title to land cannot be extinguished or transferred by acts *in pais* or by oral declarations. 'What I induce my neighbor to regard as true is the truth as between us, if he has been misled by my asservation,' became a settled rule of property at a very early period in courts of equity. The same principle is thus stated by Chancellor Kent in *Wendell vs. Van Rausselaer*, 1 Johns (N. Y.) Ch. 344: 'There is no principle better established, in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel.' p. 354."

In

*Linton v. Nat. Life Ins. Co.*, 104 Fed. 584,

Judge Sanborn states the rule as follows (p. 589):

"\* \* \* One who by his acts or representations or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped from interposing such denial."

In the case of

*Given v. Times Printing Co.*, 114 Fed. 92,

the same authority states the rule as follows (p. 95):

“No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself or more salutary in its effects, than that one who, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial. This principle is equitable, because it forbids the untruthful or culpably negligent deceiver from profiting by his own wrong at the expense of the innocent purchaser or contractor who believed him. It is salutary because it represses falsehood and fraud. It rests on the solid foundation of our common sense of justice, which revolts at the idea of rewarding the intentional or culpably negligent deceiver at the expense of the innocent purchaser who believed him.”

In this latter case this rule was applied to a sole stockholder in a corporation who had sold his stock without disclosing the fact of the existence of an indebtedness of the corporation to him.

The rule in Iowa is laid down as follows:

“Where a party by his conduct induces another to act to his own disadvantage he will not afterwards be permitted to change his position.”

*Wright v. Leith*, 146 Iowa 290.

*Seberg v. Bank*, 141 Iowa 99.

*Anderson v. Buchanan*, 139 Iowa 676.

It will be remembered that in February, 1890, the defendant, F. M. Hubbell, and G. M. Dodge each purchased of the Purchasing Committee one-eighth (or 500 shares) of the capital stock of the defendant company, for which they paid a valuable consideration, which consideration was finally received by The Wabash Company; that in June of the same year, the defendant, F. M. Hubbell, purchased an additional 500 shares from the Purchasing Committee; that this stock became the property of the Des Moines, Northern & Western Railway Company, and that in 1892 the defendant, F. M. Hubbell & Son, acquired from the Des Moines, Northern & Western Railway Company 2,500 shares of the stock of the defendant company, which ever since said date has stood upon the books of said company as owned by F. M. Hubbell & Son; that during all the years since 1890, up to the commencement of this suit, the defendant, F. C. Hubbell, devoted substantially all his time to the growth, management and development of the terminal property, and the defendant, F. M. Hubbell, a large share of his time to such purpose, without any compensation whatever, except as might accrue to them by reason of the increase in the value of the property and the resulting increase in the value of their stock.

Upon this branch of the case, what we have for consideration is, what acts were done or representations made, either active or passive, by complainants and their predecessors, leading the defendants to believe, and authorizing them to believe that the defendant company had a good title to the property in controversy, and therefore that their stock represented a beneficial interest therein and induced them to part with

their money and devote years to the development of the terminal property.

As we have already said, the contract of January 2, 1882, did not contemplate the organization of a terminal railway, but rather a terminal property which might be used jointly by the parties to that contract and such others as might thereafter join. What is there in the record to show a change in this plan and upon which defendants had a right to rely?

The articles of incorporation of the defendant company adopted in 1884 were, as we have already shown, adopted at the instance of, and specifically ratified by the three railroad companies parties to the contract of January 8, 1882.

After setting out this contract as a part of the preamble, those articles provide (vol. II, p. 419):

“Whereas, it was provided in the contract aforesaid that a Depot Company might be organized to take permanent charge of the property, and it was *the understanding of the parties* that such Company might acquire, operate and maintain said property in such manner as best to serve the interest of the parties hereto.”

Were the defendants required to understand from this that the beneficial interest in this property was still to remain in the three railroads parties to the contract of 1882, and that the terminal company was to only acquire a naked legal title to the property, or were they justified in believing that this evidenced a change in the plan? Note that this recital states the fact that the contract provides “*that a Depot Company might be organized to take permanent charge of the property,*” but that it was the “*understanding*” (not the contract

of the parties), that such company might "*acquire*," etc. This latter was something outside of the contract and an understanding which the parties were proceeding to carry out.

Likewise the next recital:

"Now, Therefore, for the purposes aforesaid, *as well as for those hereinafter expressed*, the undersigned hereby associate themselves in a body corporate, and adopt the following:"

Were they required by this to understand that this corporation was being born simply for the purpose of carrying out literally the contract of 1882, or were they justified in believing that there were some other purposes, to-wit, "*those hereinafter expressed*"?

Note the provisions of article 2, which provide that the general nature of the business to be transacted shall be the "*construction, ownership and operation of a railway*, in, around and about the City of Des Moines, Iowa," including the ownership of depots, freight houses, etc., and the business of transferring cars, none of which was contemplated by the contract of January 2, 1882. By these articles the terminal company assumed the powers and incurred the obligations of a common carrier—something which was not contemplated by that contract. Were not the defendants authorized from this to believe that a change was contemplated in the terminal plans, as indicated by that contract?

Again, examine article 3 of the original articles of incorporation (vol. II, p. 420), which fixes the capital stock at \$1,000,000.00 and authorizes its issuance and authorizes the board

“to receive in *payment* therefor the *property* and *franchise* in the City of Des Moines, now held by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Trustee, Jas. F. How and Grenville M. Dodge.”

Now the contract of January 2, 1882, did not contemplate that the terminal property should be acquired by an independent corporation, or that the franchise incident to the terminal property should be acquired by a terminal corporation, but this article indicates that at this time it was contemplated that both the terminal properties and the franchises incident thereto should be acquired by the defendant company in consideration of the issuance of its capital stock. Ought the defendants to have understood from this that no change had been made in the plan as evidenced by the contract of January 2, 1882?

These were acts of the three railroads parties to the contract of January 2, 1882, and complainants' predecessors, which were specifically authorized and afterward specifically ratified by action of their boards of directors. By the adoption of these articles there was created a corporation for pecuniary profit under the laws of the state of Iowa, for the specific purpose of acquiring the terminal property and the “*franchises*” connected therewith.

A mere depot company organized in strict accord with the 1882 contract or in strict accord with the statutes of Iowa, Section 2099, Code of 1897, authorizing the formation of depot companies is something very different from the terminal company which the parties did in fact create by their articles of incorporation.

The Company in fact formed was organized under the general incorporation laws of the State and was vested with all the powers of a railroad company and this none the less so, that its lines were all within the limits of the City of Des Moines, and that it possessed among its powers, the distinctive powers of a depot company.

A depot company under the laws of Iowa is restricted as to the manner and extent of acquiring property and also as to the functions it may perform. In the case of Morgan against this very company, 113 Iowa 561, the crucial question was as to the character of it, whether a mere depot company or a railway company. Of a depot company, the Court said:

"It is not intended that it shall operate locomotives or cars. Its purpose is to construct buildings and tracks for use by railway companies."

As to railway companies the Court said:

"There is no reason for assuming that a railway company could not also, irrespective of this act (Depot Act) construct a union depot, or that in so doing it would lose any of the powers it possessed under the general incorporation Act."

It was contended that because this railway was confined within the city limits and its business was principally a terminal business, it was therefore not a railway, but a depot company. As to this the Court said:

"We hardly think it is meant that a railway's rights are to be measured by its length. Nor do we believe that length of line alone fixes the character of such a corporation. This (the Des Moines Union) is solely a commercial railway, and as such it is invested with the rights given by statute alike to all incorporations of that character. The num-



ber of tracks which they may lay is not limited by statute, and it would seem contrary to public policy that such limitation should be made. They are and should be allowed to provide facilities for doing the business required by public demand."

What were the defendants authorized to believe and understand from the resolutions passed by the three railroad companies parties to the contract of January 2, 1882, on the 1st day of January, 1885? The resolutions were exactly alike and we need consider only one set of them.

One of the resolutions passed by the stockholders of the St. Louis, Des Moines & Northern Railway Company at this time was as follows (vol. II, p. 423):

"Whereas, on the 10th day of December, A. D. 1884, a corporation under the name and style of the Des Moines Union Railway Company was organized as contemplated, and provided in the aforesaid contract to *acquire, hold, use and enjoy the real estate property, rights and franchises in the City of Des Moines, east of Farnham Street in said City of the aforesaid railway companies and signatories of said contract acquired or held thereunder and to carry out the purposes of the said contract of January 2nd, 1882.*"

What did the defendants have a right to believe from this action? The right to use the terminal property for the purpose of carrying on a terminal business was a *franchise* which was possessed by the three railway companies in the City of Des Moines by reason of their having devoted the terminal property to terminal purposes; and it was this franchise, as well as the property itself, which the complainants' predecessors say in

this resolution it was contemplated should be acquired by the terminal company.

The resolution then, after having specifically ratified the articles of incorporation of the terminal company, proceeds as follows:

"Resolved: That the proper officers of this Company be authorized upon the issuance to it of the share of the bonds and stock of said Des Moines Union Railway Company to which it may be entitled, under said contract to convey, assign and transfer to said Company all its right, title and interest of whatever name and character, in and to the real estate, franchises, choses in action and rights in possession or contingent to all the property in the City of Des Moines east of Farnham Street in said City, now held, enjoyed or claimed by either or all of the signatories of said contract of January 2, 1882, or any agent or trustee thereof purchased, acquired or held in pursuance of said contract."

Let us inquire what possible interest complainants' predecessor, the St. Louis, Des Moines & Northern Railway Company, could have possessed in the terminal property which was not authorized by this resolution to be transferred to the defendant company. This resolution covered all the property held by any of the signatories to the contract of January 2, 1882, and authorized the transfer of all the "*right, title and interest of whatever name and character*" the St. Louis, Des Moines & Northern Railway Company had in said property or franchises.

As we have said, identical resolutions were passed by the two other railroads parties to the contract.

Again, note the resolutions which were passed by the defendant company on the same day (vol. II, p. 432.5), a part of which is as follows:

"That the President, Vice President, Secretary and Treasurer of this Company be, and they are hereby, appointed a Committee to confer with the several parties to said contract and agree with them severally upon the *terms and price at which they will respectively assign, transfer and convey said railroad property and franchises to this Company*, and procure from them, and each of them, such conveyance and transfers as may be necessary to fully invest this Company with the *title, control and management of said properties* provided for in said contract of January 2nd, 1882."

Were the defendants authorized to believe that it was the understanding of the defendant company that it was to get transfers which would "*fully invest*" the defendant company with the "*title*" to the terminal property, or should they have understood that this language contemplated that the three railroads parties to the contract of January 2, 1882, would still continue to be the beneficial owners of the property?

These resolutions were known to Mr. Hubbell, because he was a director in, and secretary of each of these companies, and they stood unrepealed on the record and were acted upon by the execution of the deeds of 1888.

Again, take the resolutions of November, 1887, by which the trustees, How and Dodge, were authorized to transfer the legal title to the defendant company upon payment of the purchase price therefor. These resolutions were passed and notice thereof was given to the defendant company, whereupon that company, acting

through its board of directors, after reciting the giving of said notice, resolved as follows (vol. IV, p. 1200):

"Therefore, It Is Resolved, That on receipt from the Des Moines & Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company and the Des Moines & St. Louis Railway Company and from James F. How, Trustee, and G. M. Dodge, of deeds to this Company of the property standing in their name in the City of Des Moines, that the officers of this Company be authorized to issue to said James F. How and G. M. Dodge, respectively, an agreement to deliver to them, as soon as prepared, bonds for the amount of money with interest and taxes added, which will be shown by them, at that time, to have been expended by or through them for or on the property referred to."

By this resolution and an additional resolution passed at the same time, which we have not taken the space to quote, the defendant company accepted the proposition made to it by the three railroad companies and agreed, in consideration of a transfer of the property, to pay therefor the full amount which the three railroad companies, or others in interest, had invested in the terminal property, together with interest and taxes, and in addition thereto issue to them defendant's capital stock. There was in this resolution no reservation to the three railroad companies of any interest in the terminal property.

So we see that not only was a corporation organized for the specific purpose of acquiring the title to this property and the franchises incident thereto, but that a transfer of such property and the franchises incident thereto was properly authorized by all of the cor-

porations interested therein, and this without any reservations of any kind. Let us now see what was actually done to carry out these resolutions.

Deeds were duly executed and delivered to the defendant company by How and Dodge. Of course, How and Dodge being merely trustees, could not on their own motion have transferred to the defendant company a good title, but their deeds taken in connection with these resolutions and the actual payment of the purchase price, would and did of themselves transfer a perfect title. However, we are not required to rely upon these deeds. Fortunately, both the Des Moines & St. Louis Railroad Company and the St. Louis, Des Moines & Northern Railway Company executed deeds to this property, the former covering all the property, and the latter a portion thereof.

The deed of the Des Moines & St. Louis Railroad Company, after describing the particular property which stood in its name, continued as follows (vol. II, p. 458):

"And all of the real estate within the City of Des Moines, Iowa, which is the property of the grantor."

Now what was the purpose of putting in the deed this clause, and to what property did it refer? The deed had already contained a description of the specific property which stood on the record in the name of the Des Moines & St. Louis Railroad Company, and therefore this clause must have referred to some other property. Under the contract of January 2, 1882, the Des Moines & St. Louis Railroad Company was the beneficial owner of one-half of all the terminal property, no matter in whose name it stood, and it was the

only party who could authorize or transfer such beneficial interest. Therefore, this clause in the deed must have reference to that portion of the terminal property in which the Des Moines & St. Louis Railroad Company owned a beneficial interest of one-half which did not stand in its name, and this thought is emphasized by the following language of the deed (p. 458):

"together with all real estate which may hereafter be acquired by this grantor either by condemnation proceedings or otherwise. Also all its embankments, bridges, turnouts, side-tracks, buildings and structures, water tanks and fixtures, shops, engine and other houses, depots, turntables and all its railroad property acquired and to be acquired, and everything appurtenant to said railroad, and all franchise and rights it may have acquired by grant, donation, purchase or otherwise, and particularly all rights, franchises and privileges granted by the City of Des Moines, Iowa, under an ordinance 'granting the right of way to the Des Moines and St. Louis Railroad Company and its assigns, over, across, along and upon certain streets and alleys in the City of Des Moines, Iowa, and the right to bridge the Des Moines River on the south alley in said City between Court Avenue and Vine Street.' "

Upon this terminal property had been constructed embankments, bridges, turnouts, sidetracks, buildings and other structures, and of one-half of this the Des Moines & St. Louis Railroad Company was the beneficial owner under the contract of January 2, 1882, and this deed was for the purpose of transferring to the defendant company this beneficial ownership.

The deed then continues (p. 458):

‘And the said Des Moines and St. Louis Railroad Company hereby covenants, *to warrant and defend* the said premises against all the *lawful claims of all persons whomsoever, claiming by, through or under it.*”

When the defendants examined this deed and noted that it not only described the property which stood in the name of the Des Moines & St. Louis Railroad Company, but also included all the property of every kind and character owned by that company in the City of Des Moines, or in which it had any interest, and that it warranted the title to said property against all persons claiming by, through or under it, what reason did they have to believe that there was reserved to that company any possible interest in this property?

The deed of the St. Louis, Des Moines & Northern Railway Company (ex. 21, vol. II, p. 455) is no less significant. After describing the specific property which stood in its name, this deed continues:

“\* \* \* \* Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest in the above described property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances. To Have and to Hold all and singular the above mentioned and described premises together with the appurtenances, unto the said parties of the second part and assigns forever.”

Upon reading this deed, ought the defendants to have believed that by the terms thereof the St. Louis, Des Moines & Northern Railway Company retained any interest of any kind in this property? If this language does not convey all and every possible interest which that company had in the real estate described, what language could be conceived which would effect that purpose?

The next act of the parties was the making of the contract of May 10, 1889, the parties to which were the defendant company on the one hand, and the Des Moines & St. Louis Railroad Company, the St. Louis, Des Moines & Northern Railway Company and the Des Moines & Northwestern Railway Company (successor to the Des Moines Northwestern Railway Company) on the other (vol. II, p. 479).

This contract, in so far as it relates to the title and ownership of the property, is as follows:

“Whereas, the said party of the first part (the Des Moines Union Railway Company) is the owner of valuable terminal facilities in the City of Des Moines, Iowa, as hereinafter described; and

Whereas, the respective parties of the second part have railroads in the State of Iowa which terminate at, or run into and through said City of Des Moines, and in order to prevent unnecessary expense, inconvenience and loss attending the accumulation of a number of stations, and in order to facilitate the public convenience and safety, it has become important that said second parties should have the use of the terminal facilities of said first party; and

Whereas, said party of the first part has become incorporated and organized under the laws of the State of Iowa *for the purpose of owning and op-*



erating a line of railway in the said City of Des Moines, Iowa, extending from the eastern boundary line of said city to Farnham Street, in the western part thereof; and

Whereas, said party of the first part, in pursuance of said charter has *acquired* and now *owns* a railway in said city, as above set forth, and has already acquired or constructed a large number of valuable main and side tracks, depots, depot grounds, lands, yards, shops, round houses, freight houses and other terminal facilities, and intends to acquire and construct more; and

Whereas, said second parties are each desirous of having the right to use said terminals in connections with their respective railroads; and

Whereas, for the protection of the parties hereto and their assigns, it is important that the rights, duties and liabilities of each in regard to the whole subject-matter of said terminal facilities, including their use, care, control, rental, taxes, expenses, renewals, insurance and repairs, shall be stated and defined.

Now, therefore, in consideration of the premises, it is mutually agreed by and between said party of the first part and each of the several parties of the second part (each of said second parties contracting for itself), as follows:

Section One. The party of the first part agrees to proceed with reasonable dispatch, and whenever its board of directors shall deem it expedient, to erect and furnish for the use of the parties of the second part, in said City of Des Moines, a union passenger depot, and such additional switches, sidings, freight depots, round houses, shops, water tanks, and yard appurtenances, as the board of directors of said first party may consider reasonable, and for those purposes said first party shall acquire by lease, purchase or otherwise such additional real estate as may be necessary.

Section Two. The amount of such additional grounds and the form, character and cost of said union depot and other structures and appurtenances to be erected and furnished by said party of the first part, as well as the management, operation, improvement and repairs thereof, shall in all matters not otherwise specifically provided for herein, be determined by the board of directors of said first party."

Here is the language of the parties themselves (the predecessors of complainants) put in writing a little more than a year after the transfer of the property to the defendant, by their own counsel.

Now, if the second parties to this contract (complainants' predecessors) were the beneficial owners of this property, why did they state in this contract that the Des Moines Union Railway Company was the owner of it, and why, if they were the beneficial owners of this property or entitled to use the same for railway purposes in perpetuity, were they contracting with the Des Moines Union Railway Company for such use or anything more than the mode of operating the property? And why, if the defendant company was organized merely for the purpose of holding the naked legal title to this property, do they recite the fact that it was organized for the purpose of owning and operating a line of railway in the City of Des Moines? And why do they state that in pursuance of its charter it has already acquired and owns a railway and intends to acquire and construct more? And why do they recite the fact that the parties of the second part (complainants' predecessors) are desirous of having the right to use said terminals in connection with their respective railroads, if they already had that right? And why, if the

Des Moines Union Railway Company was a mere agency for these three railroad companies, do they provide that the question of the extent of property to be acquired and constructed shall be vested in the board of directors of the Des Moines Union Railway Company?

If the court has any lingering doubt in its mind on the subject under consideration, examine now the proceedings of April 8, 1890, by which the articles of incorporation of the defendant company were amended, and the proceedings leading up thereto.

Upon a little reflection, the causes leading up to this action, and the purposes thereof, become perfectly apparent. The items to which we have called the court's attention demonstrate an intention on the part of all parties to give to the defendant company a perfect title to the property in controversy, notwithstanding the fact that as originally contemplated by the contract of January 2, 1882, the beneficial ownership of the property was to be in the three railroad companies parties thereto. An ambiguity had crept into the record by reason of the fact that the contract of January 2, 1882, had been included in the articles of incorporation as a preliminary recital thereto. We are not here going to set out the proceedings of April 8, 1890, as they have heretofore been quite extensively referred to in two different places in our brief. They concededly show an intention to forever put at rest any question about the title to the terminal property. The persons who took part in the meeting were the persons who knew what had been intended, because they had been the actors from the beginning. Complainants and their predecessors conducted the affairs of the defendant corporation under these amended articles of incorpor-

ation for more than seventeen years prior to the commencement of this suit. Read them and then answer the question of whether or not the defendants were authorized to believe that the defendant had a good title to the property in controversy, and that the capital stock of the defendant company represented a beneficial interest therein.

Let us now turn to the sale and transfer of the stock in the defendant company. The first transaction to which we will call attention is the contracts by which Polk & Hubbell acquired for the Des Moines & Northwestern Railway Company the line of road extending from Des Moines to Fonda and formerly owned by the Des Moines Northwestern Railway Company, and a one-fourth of the capital stock of the terminay company.

It will be remembered that by the terms of the contract of October 9, 1886 (ex. 263, vol. IV, p. 1573), Polk & Hubbell agreed to purchase of the Purchasing Committee the line of railway formerly owned by the Des Moines Northwestern Railway Company, and a one-fourth interest in the terminal property. By a supplemental agreement made the 10th day of September, 1887 (ex. 265, vol. IV, p. 1575), it was agreed in part as follows (p. 1576):

"Simultaneously with the conveyance above mentioned of one-fourth interest in the terminal property at Des Moines, the same shall be mortgaged back to the Purchasing Committee for the further security of the said \$145,000. In case however, the terminal property at Des Moines shall be merged in a terminal company either before or after the transfer of one-fourth interest a above, the bonds and stock received from the Terminal Company in exchange for said one-fourth

*interest* shall be transferred *in lieu of* the property of Messrs. Polk & Hubbell, or their assignees, or transferred by them to the Committee, to be held by the Committee as a further security for the payment of the \$450,000 above mentioned."

Now, by the terms of this contract the Purchasing Committee agreed to transfer to Polk & Hubbell a one-fourth interest in the terminal property, without any reservation whatever, on "*in lieu thereof*," the stock and bonds received from the terminal company in exchange for said one-fourth interest. It is apparent that one-fourth of the stock and bonds couldn't be equivalent to one-fourth of the property unless the corporation issuing the stock and bonds had a perfect title to the property.

It will be remembered that in February, 1890, Mr. Hubbell and General Dodge each purchased of the Purchasing Committee certain bonds of the Des Moines Union Company and one-eighth of its capital stock, and this purchase was formally ratified at a meeting of the directors of the Des Moines & St. Louis Railroad Company held April 8, 1890, at which were present James F. How, C. M. Hays, F. M. Hubbell, A. B. Cummins, H. S. Priest and George C. Grover, all of whom, except Mr. Hubbell, were officers or attorneys for the complainant, The Wabash Company. We have already shown that the purchase price for this stock was paid to the Purchasing Committee and by them paid to the complainant, The Wabash Company, and that the latter still retains this purchase price. We have also shown that the contract covering this purchase was prepared or revised by Colonel Blodgett. Now what were the members of the Purchasing Committee and

Colonel Blodgett, Mr. Hays, Mr. How, and the attorneys of The Wabash Railroad Company trying to do when they sold this stock to Hubbell and Dodge? There is no room for question here. On the one side they were selling, and on the other were buying, what on both sides was believed to be of substantial value.

In this connection, it is important to note that the action of the Purchasing Committee was specifically ratified by the board of directors of the complainant, The Wabash Company, after the same had been reported to it by the Purchasing Committee and investigated by E. B. Pryor, then assistant auditor of the railroad company. Commencing on page 1540 of volume IV will be found a report made by the Purchasing Committee to the board of directors of the Wabash Company on August 16, 1898, in which it makes an accounting to the railroad company of all its doings. The Purchasing Committee reports the sale of the stock and bonds of the Des Moines Union Railway Company and accounts for the proceeds thereof (see top of p. 1543), and again reports the amount received as interest on bonds and stock of the Des Moines Union Railway Company (see p. 1544, near bottom of page). Upon presentation of this report to The Wabash Company, Mr. E. B. Pryor, assistant auditor, makes an affidavit that he has examined in detail the books and accounts of the Purchasing Committee, as well as the attached report, and he believes the same to be correct (near bottom of p. 1551).

Passing upon this report, the board of directors of The Wabash Company state in part as follows (p. 1552):

‘Whereas, Said report, and the form of said conveyance and assignment are satisfactory to the Board of Directors; Now, Therefore, Be It

Resolved, That said final report and statement of the accounts and doings of said Committee under said agreements, be, and the same hereby are approved.”

How can The Wabash Railroad Company, which received and retains this money, now claim that the stock didn't represent anything of value?

The same remarks apply to the subsequent transaction of June, 1890, by which Mr. Hubbel purchased of the Purchasing Committee an additional 500 shares of stock in the defendant company, as to the details of which we do not here need to go.

It will be remembered that all the stock acquired by Mr. Hubbell and General Dodge from the Purchasing Committee afterward became the property of the Des Moines, Northern & Western Railroad Company, and that about October, 1893, F. M. Hubbell purchased of this Company 2,500 shares of this stock, which was immediately transferred to F. M. Hubbell & Son on the books of the defendant company and has ever since so remained. F. M. Hubbell & Son paid a valuable consideration for this 2,500 shares of stock and paid it to the predecessor of the Chicago, Milwaukee & St. Paul Railway Company, and that Company acquired its first interest in its predecessor with full knowledge that these 2,500 shares of stock had been transferred to F. M. Hubbell & Son, and that the only interest which its predecessor had in the terminal property or the terminal company was the interest represented by the 1,000 shares of stock which its predecessor then had and which is now owned by the complainant, the Mil-

waukee Company. Subsequently the Milwaukee Company acquired the property of its predecessor by purchase, and never suspected that it thereby acquired any interest in the terminal property except that represented by this 1,000 shares of stock.

Among the things upon which the Hubbells were justified in relying, as indicating that the complainants and their predecessors claimed only a stock interest in the property, is the fact that from the very beginning (May 1, 1888), the affairs of the defendant company were managed by its own stockholders, its board of directors and its officers. It acquired additional real estate, it constructed depots, buildings, trucks and other terminal facilities, made contracts with the complainants, their predecessors and other parties and performed all its obligations to the public as a common carrier.

In every way, for a period of nearly twenty years prior to the bringing of this suit, the defendant treated this property as its own, and all this with the knowledge of the complainants and their predecessors, because at every annual stockholders' meeting the complainants or their predecessors were present, as shown by the record, and at each of these meetings there was read for the information of the stockholders the minutes of all the meetings of the directors and the executive committee since the last preceding annual stockholders' meeting, and the action of such directors and executive committee was formally approved.

Not only this, but the record shows that from the time F. M. Hubbell & Son acquired this stock in 1893, it was voted by them at each stockholders' meeting for the purpose of managing the affairs of the defendant company, and no question was ever raised with respect



to their right so to do. In other words, the defendants, with the knowledge and acquiescence of complainants and their predecessors, treated this stock as though it represented a valuable interest in this property, and because thereof they gave their time for the best part of their lives to the development and improvement of this property without any compensation whatever except that which will accrue to them by reason of the increase in the value thereof. Not only this, but the question of the ownership of this stock by F. M. Hubbell & Son was specifically brought to the attention of the complainants and their predecessors.

It will be remembered that the twenty-sixth section of the contract of May 10, 1889 (vol. II, p. 486), which was executed before any certificates of stock were issued, provided that the stock of the defendant company should be issued one-half to the Des Moines & St. Louis Company, and one-fourth each to the Des Moines & Northwestern Company and the St. Louis, Des Moines & Northern Company.

Subsequent to the date the defendant, F. M. Hubbell & Son, required the 2,500 shares of stock in the defendant company and the same were transferred upon the books of the defendant company to F. M. Hubbell & Son, negotiations were had for the renewal or extension of the operating contract of May 10, 1889.

Several drafts of such a contract were prepared and considered by the defendant and by the complainant, The Wabash Company.

These proposed agreements appear in volume IV as defendants' exhibits 382 (p. 1694), 383 (p. 1703), 384 (p. 1712) and 385 (p. 1713). In each one of these drafts appears the following as a part of the last section (pp. 1702, 1711, 1722 and 1733):

"It is further understood and agreed that this contract is entered into in lieu of and as a substitute for a certain agreement entered into on the 10th day of May, 1880, between the Des Moines Union Railway Company, the Des Moines & St. Louis Railroad Company, the Des Moines & Northwestern, and the St. Louis, Des, Moines & Northern Railway Company, \* \* \* and that the capital stock of the said Des Moines Union Railway Company therein mentioned is now rightfully held as follows, to-wit:

The Purchasing Committee of the Wabash, St. Louis & Pacific Rail- way Company	500 Shares
The Des Moines, Northern & West- ern Railroad Company	1,000 Shares
F. M. Hubbell & Son	2,500 Shares

Of the above shares belonging to said Purchasing Committee, two shares stand upon the books of the Company as follows: Joseph Ramsey, Jr., One Share, and H. L. Magee, One Share.

Of the shares belonging to the Des Moines, Northern & Western Railroad Company two shares stand upon the books of the Company as follows: A. B. Cummins One Share, F. M. Hubbell One Share.

Of the shares belonging to the said F. M. Hubbell & Son five shares stand upon the books of the Company as follows:

F. M. Hubbell	One Share.
F. C. Hubbell	One Share.
H. D. Thompson	One Share.
A. S. Denman	One Share.
C. Huttenlocher	One Share."

These proposed contracts were discussed and criticized by the officers and attorneys of the complainant,

the Wabash Company, and the defendant, the Des Moines Union Company, and various changes were from time to time proposed, but at no time was any question raised about the correctness of this portion of the proposed contracts reciting the ownership of the capital stock.

The making of this new contract took the shape of what is known as the ratification contract of July 31, 1897.

This contract had the following provision in it referring to the issuance of stock provided for in the contract of May 10, 1889 (vol. II, p. 508):

*"But it is expressly provided that so much of the said contract (contract of May 10, 1889), a copy of which is hereto attached, as relates to the issuance and the distribution of the capital stock of the said Des Moines Company, is no longer binding, and that the capital stock of the said Des Moines Company is held as follows:*

The purchasing committee of the Wabash, St. Louis & Pacific Railway Company, 500 shares.

The Des Moines, Northern & Western Railroad Company, 1,000 shares.

F. M. Hubbell & Son, 2,500 shares.

Of the above shares belonging to said purchasing committee, two shares stand upon the books of the company as follows: Joseph Ramsey, Jr., 1 share; and H. L. Magee, 1 share.

Of the shares belonging to the Des Moines, Northwestern Railroad Company, two shares stand upon the books of the company as follows: A. B. Cummins, 1 share; and F. M. Hubbell, 1 share.

Of the shares belonging to said F. M. Hubbell & Son, five shares stand upon the books of the company as follows: F. M. Hubbell, 1 share; F. C.

Hubbell, 1 share; C. Huttenlocher, 1 share; H. D. Thompson, 1 share; A. N. Denman, 1 share."

This contract was signed by the plaintiff, The Wabash Company, by O. D. Ashley, president, as well as by the Des Moines Union Railway Company and the Des Moines, Northern & Western Railroad Company.

Its execution was authorized and ratified at a meeting of the directors of The Wabash Company held October 5, 1897, and a copy of it spread upon the records of that company (ex. 237, vol. IV, p. 1540). Its execution was also ratified at a meeting of the board of directors of the Des Moines, Northern & Western Railway Company, predecessor of the Chicago, Milwaukee & St. Paul Railway Company, on September 7, 1897 ex. 145, vol. IV, p. 1357).

The things to which we have called attention are only a portion of the things sustaining the proposition that the defendants were at all times authorized to understand that the ownership of the terminal property by the defendant company was conceded and recognized at all times by the complainants and their predecessors.

The court can open this record at any place and find evidence to sustain this theory.

It seems hardly worth while to discuss the question of whether or not the defendants relied upon these acts and representations of the complainants and their predecessors, and whether they changed their position relying thereon. Mr. Hubbell testified as to their reliance and there is no evidence to dispute it, and it is undisputed that the defendants, F. M. Hubbell and F. C. Hubbell, parted with their money for this stock, and that they have devoted a great share of their lives to the conservation and building up of the terminal prop-

erty without hope of reward except such as may grow out of the increase in the value of the stock.

The time and effort spent by the Hubbells in conserving, extending and transacting the business of the terminal company is no small or insignificant item. The testimony of Mr. F. M. Hubbell as to the services performed by him appears in volume III, commencing at the bottom of page 1036 and continuing to about the middle of page 1039. According to his testimony, he has been active in financing the defendant company, in extending and building up its property, in negotiating contracts for tenant companies other than complainants and their predecessors, and in many other ways has helped to develop the property. The testimony of defendant F. C. Hubbell on this subject appears commencing near the bottom of page 1195 and extending to about the middle of page 1197 of volume III. An examination of this testimony and the voluminous correspondence and other documents contained in defendants' book of exhibits will disclose the fact that Mr. F. C. Hubbell, who became president of the defendant company in January, 1892, has ever since said date devoted substantially all his time to the prosecution of its business. While his title has been that of president, he has in fact been performing the duties of general manager and purchasing agent. Not only this, but the devotion of the Hubbells to the interests of the Des Moines Union, the satisfactory character of their services, the success that has attended their efforts to develop the property and promote its interests, or the time and effort devoted by them thereto, is not, and cannot be questioned by the complainants.

#### IV.

### THE COMPLAINANTS ARE ESTOPPED BY THEIR LACHES FROM THE BRINGING AND MAINTAINING OF THIS SUIT.

For the purpose of this question it is necessary to refer to the statute of limitations of the State of Iowa. Section 3447 of the Code of Iowa, 1897, provides :

“Actions may be brought within the times herein limited, respectively, after their causes accrue and not afterwards, except when otherwise specially declared. \* \* \*

Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years.”

As we understand the doctrine of laches, the cause of action contained in this bill would be barred at the end of five years from the time it accrued, unless complainants should allege and prove facts which would make it inequitable to follow the rule of law on that subject.

The subject of laches as applied to this case, and the facts bearing thereon, have necessarily been inferentially discussed in our entire argument, and specific reference to the doctrine as applied to the amendments to the articles of incorporation of April 8, 1890, has been made in our discussion of those amendments. We may, therefore, include a more general discussion of the subject here.

As we understand complainants' theory, one of their claims is that the property in controversy is charged

with a trust in their favor. It is necessary, then to consider the character of the alleged trust, because if the trust is an express one then the statute of limitations does not commence to run until there is a disclaimer of the trust, but if the trust is an implied one the statute of limitations commences to run and therefore the doctrine of laches applies at the time the trust relation attached.

In order to determine the character of this alleged trust, it is necessary to consider the title to the property in controversy, and the law of the State of Iowa, in which the property is situated, with respect thereto.

The rule on this latter subject is stated by this court in

*Kerr v. Moon*, 9 Wheat. 565,

in the following language (p. 569) :

“It is an unquestionable principle of the general law that the title to and disposition of real property must be exclusively subject to the laws of the country where it is situated.”

Again, in the case of

*McCormick v. Sullivant*, 10 Wheat. 192,

the court, speaking of the title to certain lands in the State of Ohio, said (p. 201) :

“By the law of the State of Ohio, lands lying in that state may be devised by last will and testament in writing, but before such will can be considered as valid in law it must be presented to the court of common pleas of the county where the land lies for probate and be proved by at least two of the subscribing witnesses. If the will be

proved and recorded in another state according to the laws of that state, an authenticated copy of the will may be offered for probate in the court of the county where the land lies, without proof by the witnesses, but it is liable to be contested by the heirs at law as the original might have been.

It is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which the title to it can pass from one person to another."

Having determined that the title to this property depends upon the law of the State of Iowa, and therefore the question of whether or not it is subject to a trust, and if so, the character of the trust, must be determined by such law, let us examine the statutes and decisions of Iowa.

Section 2918 of the Code of 1897, which has been in force since long before the conception of the terminal scheme, provides as follows:

"Declarations or creations of trusts or powers in relation to real estate must be executed in the same manner as deeds of conveyance; but this provision does not apply to trusts resulting from the operation or construction of law."

Under this section, clearly the property in controversy is not charged with an express trust in the hands of the defendant company, because no declaration of trust was ever executed by it as provided by this statute.

But what we understand complainants to claim is that by reason of certain provisions in article 2 of the



original articles of incorporation of the defendant company, and by reason of incorporating therein as a preamble thereto the contract of January 2, 1882, the property in controversy in the hands of the defendant company is charged with a resulting trust.

As we understand the rule with respect to resulting trusts, the statute of limitations commences to run at the time of the creation of the trust, or, to apply the doctrine of laches in determining the time within which the trustee will be protected, the time commences to run at the time of the creation of the trust.

In the case of

*Boone v. Chiles*, 10 Pet. 177, 222,

the court said:

“Though time does not bar a direct trust as between trustee and *cestui que trust*, till it is disavowed; yet where a constructive trust is made out in equity, time protects the trustee, though his conduct was originally fraudulent and his purchase would have been repudiated for fraud. \* \* \* So where a party takes possession in his own right and was *prima facie* the owner and is turned into a trustee by matter of evidence merely.”

And in the case of

*Spicdel v. Henrici*, 120 U. S. 377, 386,

the court said:

“In the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law.”

But whatever the rule may be with respect to the character of the alleged trust in question, or when the statute commences to run, as applied to implied or resulting trusts, the rule is established by all the authorities, that the time commences to run at least as soon as there has been a repudiation of the trust. As to this proposition, we will not take the time here to quote from the authorities, but a few of them will be found in our brief.

It is clear from the record in this case that if the property in controversy was ever charged with a trust in the hands of the defendant company, that trust was expressly repudiated on April 8, 1890. We have already called the court's attention to what occurred on that date, and we may here content ourselves with summarizing it as follows:

1. On that date the defendant company, at a meeting of its stockholders, eliminated from its articles of incorporation the contract of January 2, 1882.
2. It amended its articles of incorporation by eliminating therefrom all those provisions by which it had been attempted to restrict the power of the defendant company with respect to the alienation of its property, or which in any way qualified the defendant's title.
3. It amended its articles of incorporation so as to deprive complainants' predecessors of the power to nominate the members of the defendant's board of directors.
4. It passed resolutions expressly declaring that the defendant company was the absolute owner of the property in controversy.

5. The amendments to its articles of incorporation were properly executed, filed and recorded, and notice thereof was published as required by statute.

6. Not only did complainants and their predecessors have the notice of these transactions with which they were charged by reason of the execution, filing and recording of these amendments, and giving notice thereof, but at the next annual meeting of the stockholders of the defendant company at which complainants' predecessors were present as stockholders, the proceedings of April 8, 1890, were read, so that their special attention was called thereto.

7. The affairs of the defendant company were carried on under these amendments to the articles of incorporation for more than seventeen years after the adoption of these amendments and these resolutions, before any complaint was made thereof.

It appears, therefore, that seventeen years prior to the commencement of this suit the defendant expressly repudiated any trust in relation to this property, if one existed, and therefore, under the rule as established by the courts, the complainants must fail on account of their laches.

But the doctrine of laches, as applied to this case, may be considered in even a broader aspect. The doctrine as laid down in

*Pomeroy's Equity Jurisprudence*, Vol. 5, Sec.  
23,

is as follows:

"No doctrine is so wholesome when wisely administered as that of laches. It prevents the res-

urrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many. The equitable rule that one who is negligent shall not have relief, and the barring of proceedings after the lapse of stated periods of time by statutory enactments, are alike based upon public policy, as well as upon considerations affecting only individual rights. It is to the public interest that stability in the title to property should exist, and that all uncertainties and disputes as to the ownership of the land should be speedily put at rest. Hence, there lies at the foundation of the principle that the lapse of time will become a defense to the title of one in possession of property not only consideration for his personal rights and equities, but also a recognition of the higher public interests which can only be subserved by putting at rest, as speedily as possible, all doubts and uncertainties touching the title to realty to which end it is the duty of courts to discourage delays in the assertion of conflicting claims thereto."

The rule was laid down and applied by this court in the leading case of

*Galliker v. Cadwell*, 145 U. S. 368,

which involved the title to some real estate in the City of Tacoma in the following language:

• • • The laches of the appellant is such as to defeat any rights which she might have had, even if these prior questions were determined in her favor, and in this respect it is worthy of notice that there has been in a few years a rapid and vast change in the value of the property in question. It is now an addition to the City of Tacoma. The census of 1880 showed that to be a mere village, the population being only 1,098. The census of 1890 discloses a city, the population being 36,006. Of course, such a rapid increase during this decade implies an equally rapid and enormous increase in the value of property so situated as to be an addition to the city, and the question of laches turns not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years. The cases are many in which this defense has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that because of the change in condition or relations during this period of delay it would be an injustice to the latter to permit him to now assert them. • • •

But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some

change in the condition or relations of the property or the parties.”

Applying the principle announced in this case to the case at bar, we are unable to conceive how counsel for complainants are going to avoid its application. It will be noted that the three principal elements which form the basis of the doctrine are:

*First.* The party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum.

*Second.* That by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned.

*Third.* That because of the change in condition during the period of delay it would be an injustice to the latter to permit him to now assert them.

The rights of complainants and their predecessors with respect to the matters set up in the bill, if any they ever had, have been known to them since their inception. The contract of 1882; the fact that the Wabash Company and General Dodge advanced the money to originally acquire the terminals; the incorporation of the terminal company; the resolutions and deeds of 1885, 1887 and 1888; the contract of May 10, 1889, and the ratification thereof July 31, 1897; the amendments to the articles of incorporation of April 8, 1890, and the resolutions passed at that time; have all been known by complainants and their predecessors from the time of such transactions, because they were all parties thereto and had both actual and constructive notice thereof. During all these years the terminal

company has treated this property as its own, and with such knowledge on the part of the complainants and their predecessors, the management of the affairs of the terminal company has been controlled by its stockholders. There has been no reason why complainants or their predecessors could not at any time have brought their suit in the proper forum, to establish the rights set up in the bill, if the same existed. So that the first element supporting the doctrine conclusively appears.

For nearly twenty years prior to the bringing of this suit, the terminal company had possession of this property under contracts and deeds which purported to give it an absolute title. For nearly twenty years, with the knowledge and acquiescence of the complainants and their predecessors, the terminal company has treated this property as its own. For nearly twenty years the affairs of the terminal company have been managed and controlled by its stockholders in the ordinary and usual way. For more than sixteen years prior to the bringing of this suit, the terminal company, with the knowledge and acquiescence of complainants and their predecessors, have been acting under the articles of incorporation as amended April 8, 1890, at which time the contract of 1882 was formally repudiated.

Under these circumstances, the respondents in this case had good reason for believing that the rights which are set up in the bill, if they ever existed, were worthless and had been abandoned, not only because of the failure of the complainants and their predecessors to bring their suit in the proper forum to establish their rights, but also because they treated this property during this period as the absolute property of the ter-

minal company. The second elementary basis of the doctrine, therefore conclusively appears.

Both the condition of this property and the relations of the parties thereto have been changed during this time. Commencing with May 1, 1888, the date when the terminal company took possession of the property, that company has from time to time acquired additional property as a part of the terminal, paid for it with its own funds, improved the same, and the property, because of the fostering care of the terminal company and its officers, especially the respondents, the Hubbells, has increased very largely in value, as shown by the increased and increasing "surplus earnings" (see p. \_\_\_\_\_ of this brief). The relation of the stockholders to the property has changed. The Hubbells have bought stock of the predecessors of both complainants; and the complainants and their predecessors have had the benefit of the money and still retain it. The Hubbells have sold their interest in the northern lines to the complainant, the Chicago, Milwaukee & St. Paul, upon the theory that such northern lines owned one-fourth of the stock of the terminal company, and that five-eighths of it was owned by F. M. Hubbell & Son. For twenty years the two Hubbells have devoted a very large portion of their time in caring for and developing the property of the terminal company, without any compensation, except what they receive by reason of the increase in the value of their stock. To enter a decree such as is prayed for in the bill would not only be inequitable and an injustice to the respondents in that it would deprive the terminal company of property which it has bought under a contract with the complainants and their predecessors and for which it has paid the full market value, and deprive



the Hubbells of what they have contracted and paid for, and the fruits of their labor for more than twenty years, but would give to the Chicago, Milwaukee & St. Paul Railway Company a large and valuable property for which it has never paid a cent and which it never suspected it was purchasing, and which it was plainly told it was not purchasing, and would give to the complainant, The Wabash Company, property which it and its predecessors have sold and for which it has received and retained the price. The third element of the doctrine is, therefore, established.

The case of

*Abraham v. Ordway*, 158 U. S. 416, 420,

involved the title to some real estate in the City of Washington. The court discussed the doctrine of laches quite fully, and in holding that under this doctrine complainant's suit was barred, says, in part, as follows:

"The relief sought cannot be given consistently with the principles of justice, or without encouraging such delay in the assertion of rights as ought not to be tolerated by courts of equity. Whether equity will interfere in cases of this character must depend upon the special circumstances of each case. Sometimes the courts act in obedience to statutes of limitations; sometimes in analogy to them. But it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case, by granting the relief asked. It will in such case decline to extricate the plaintiff from the po-

sition in which he has inexcusably placed himself, and leave him to such remedies as he may have in a court of law."

It will be noted that in the case at bar there is no attempt, either in the bill or in the testimony, to furnish any excuse for the delay in bringing this suit.

Suits to establish implied trusts fall within the class of cases in which the federal equity courts follow the courts of law in applying the statute of limitations.

*Beaubain v. Beaubain*, 23 How. 190, 207.

*Speidel v. Henrici*, 120 U. S. 377, 386.

*Riddle v. Whitchill*, 135 U. S. 621.

The case of

*Speidel v. Henrici*, *supra*,

was one in which was involved an accounting for a trust fund. Upon the doctrine of laches, we quote from the opinion of the court (p. 386) as follows:

"In the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law. *Hovenden v. Annesley*, 2 Sch. & Lef., 607, 634; *Beckford v. Wade*, 17 Ves. 87. In such a case, Chief Justice Marshall repeated and approved the statement of Sir Thomas Plummer, M. R., in a most important case in which his decision was affirmed by the House of Lords, that 'both on principle and authority, the laches and non-claim of the rightful owner of an equitable estate, for a period of twenty years (supposing it the case of one who must within that period have made his claim in a court of law, had it been a legal estate), under no dis-

ability, and where there has been no fraud, will constitute a bar to equitable relief, by analogy to the statute of limitations, if, during all that period, the possession has been under a claim unequivocally adverse, and without anything having been done or said, directly or indirectly, to recognize the title of such rightful owner by the adverse possessor.' *Elmendorf v. Taylor*, 10 Wheat. 152, 174; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1, 175, and 4 Bligh, 1.

Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. 'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence: where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.' *Smith v. Clay*, 3 Bro. Ch. 640, note. This doctrine has been repeatedly recognized and acted on here."

For a full discussion of the principle as applied by this court, see

*Penn M. L. I. Co. v. Austin*, 168 U. S. 685, 696.

*Baker v. Cummings*, 169 U. S. 189, 206.

To sum up the doctrine of laches as applied to this case:

A cause of action of this character is barred by the statutes of the State of Iowa five years from accrues.

The rule in the federal equity court is that a cause of action arising under the laws of the State of Iowa will be barred by laches at the expiration of five years, unless the complainants show some good excuse for not bringing their suit within that time. No such excuse is offered in this case.

So far as the Wabash Railway Company is concerned, no trust ever existed in favor of that company, unless it was because of the fact that that company furnished a large proportion of the money with which to purchase the original properties. This would be a constructive trust against which the statute ran a long while ago.

If it be claimed that an express trust was created in favor of the three railroad parties to the contract of 1882, that trust was terminated by the organization of the terminal company, followed by the passage of the resolutions of 1887, and the execution and delivery of the deeds to the terminal company in pursuance thereof, the payment of the purchase price, and the execution of the contract of 1889 and the ratification contract of 1897.

Any possible claim for an express trust was expressly repudiated by the amendments to the articles of incorporation of April 8, 1890, which were placed upon record and published as required by law, and of which complainants and their predecessors had both actual and constructive notice. In any view of this case the doctrine of laches applies.

V.

**THE SALE AND TRANSFER OF THE TERMINAL PROPERTY TO THE TERMINAL COMPANY WERE NOT VOID AS AGAINST PUBLIC POLICY.**

Counsel for petitioners assert the principle which we accept as sound that a railroad company may not disable itself from the performance of its public functions and hence they conclude it may not divest itself of any property which it has acquired for public purposes. The conclusion does not follow.

Public policy requires nothing of the kind and general usage is to the contrary.

There is scarcely a railroad company in the country that has not from time to time parted with some of its property, and has performed its public functions all the better for so doing. Tracks have been taken up and the land has been sold or abandoned, in order to get a new line with lower grades, with less curvature or to diminish the length of the line between two places.

For a proper terminal system in a large city, which means a unitary system, it is absolutely necessary that the lines entering it part with some of their urban property. Union terminals were not and could not well be built in the beginning of railroad construction. It was in Des Moines as in other cities. The different lines of railroad reaching it or passing through it, were not all built at the same time, but at intervals of years. Each line as it came in acquired its own terminals, which proved upon many accounts to be a bad plan. It was expensive in construction and in operation. It was inconvenient to the traveler.

sightly and dangerous to the inhabitants. And so Union Terminals suggested themselves and everywhere were countenanced and encouraged by statutory enactment.

The City of Washington has its Union Terminals and this involved withdrawing from railroad use large tracts of land in the city. When the new station building was erected, the old stations were abandoned. And this was done under sanction of Acts of Congress.

The respondent, the Des Moines Union Railway Company, has for itself and for what it has done and is doing, the sanction of the statutes of Iowa as expressly declared by the Supreme Court of the State in the case of *Morgan against the Company*, 113 Ia. 561.

Union Terminals being desired by the railroad companies and by the public whoever will may participate in creating them. A corporation for the purpose is practically indispensable. And it must be a distinct institution. The railroad companies contribute money or property. Individuals may do the same. But this will not be in equal proportion. Bonds or stocks or both are issued in consideration of the money or the property contributed and appropriately in the measure of the contribution. The contributors are entitled to a return upon their investments. They are property in this respect as is any other form of investment, subject only to the restriction, which is not applied to property, not charged with a public use, that the return is not all they can get, if left entirely to themselves, but that the return may be only a reasonable one upon the value of the property.

So here the railroad companies did not disable themselves from the performance of their public duties. They simply contributed, as it was to their interest

and the public interest to do, to the construction of Union Terminals in the City of Des Moines.

*U. S. v. Terminal Ass'n*, 224 U. S. 401.

The cases cited by counsel, *Thomas vs. Railroad Co.*, 101 U. S. 71, and *Central Transportation Co. vs. Pullman Co.*, 139 U. S. 26, are not in point, because of the radical difference in the facts.

And here are transactions completed many years ago and the courts will not disturb them upon the suggestion of want of power in the parties at the time.

In *St. Louis R. R. Co. vs. Terre Haute R. R. Co.*, 145 U. S. 393, the contract by which one of the companies transferred its railroad and equipment, as well as its franchise to maintain and operate the road, to the other, was assailed for want of power to make it. Assuming that the contract was *ultra vires*, the Court said, p. 406:

"It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can, it is somewhat remarkable that, in the repeated and full discussions which the doctrine of *ultra vires* has undergone in the English courts within the last fifty years, no attempt has been made to bring a suit like this. The only cases cited in the elaborate briefs for the plaintiff, or which have come to our notice, approaching this in their circumstances, are in American courts not of last resort, and present no sufficient reasons for maintaining this suit. • • •

The general rule, in equity, as at law, is *In pari delicto potior est conditio defendentis*; and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in

equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas v. Richmond*, 12 Wall, 349, 355; *Spring Co. v. Knoulton*, 103 U. S. 49; Story Eq. Jur., sec. 298.

While an unlawful contract, the parties to which are *in pari delicto*, remains executory, its invalidity is a defense in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose. Adams on Eq., 175. Consequently, it is well settled, at the present day, that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and cancelled, upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defense. • • •

When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas v. Richmond*, above cited; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 284. For instance, property conveyed pursuant to a contract made in consideration of the compounding of a crime, and the stifling of a criminal prosecution, and therefore clearly illegal, cannot be recovered back at law, nor the conveyance set aside in equity, unless obtained by such fraud or oppression on the part of the grantee, that the conveyance cannot be con-



sidered the voluntary act of the grantor. • • •

In the case at bar, the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of nine hundred and ninety-nine years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers which it had received from the State, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was in *pari delicto* with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property, and paid the stipulated consideration from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract.

Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. *And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches.* *Harwood v. Railroad Co.*, 17 Wall. 78; *Graham v. Birkenhead &c. Railway*, 2 Hall & Twells 450, S. C. 2 Maen. & Gord. 146; *Ffooks v. Southwestern Railway*, 1 Sm. & Gif. 142, 164; *Gregory v. Patchett*, 11 Law Times (N. S.) 357.

This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain. *Spring Co. v. Knoutton*, 103 U. S. 49; *Logan County Bank v. Townsend*, 139 U. S. 67, and cases there cited.

But the case is one in which, in the words of Mr. Justice Miller in a case often cited in this opinion, the court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands. *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 316, 317. See also *Union Trust Co. v. Illinois Midland Co.*, 117 U. S. 434, 468, 469; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 56, 57, 61."

The rule established in the cited case has never been repudiated or departed from or modified by any subsequent opinion of the Supreme Court of the United States or any other court of last resort, and is the established law in this forum.

### THE ORAL TESTIMONY.

The court will observe that we have made little use of the oral testimony in arguing this case. The transactions from the very beginning down to the time of the trial of this suit are fully shown by contemporaneous documentary evidence, and about this documentary evidence there is no dispute, as it was all agreed to by counsel. It has been our thought that oral testimony of transactions taking place anywhere from fifteen to thirty years prior to the time of taking the oral testimony was of very little value as compared with docu-

mentary evidence of the same transactions about which there is no dispute. And this is especially true when the testimony is with respect to ordinary transactions of very busy men, such as was the case in the case at bar.

The unreliability of the testimony of Mr. Hays, Colonel Blodgett, and Mr. Pryor is demonstrated by an examination of their evidence. In the first place, the questions propounded to them are ingeniously stated in order to permit them to testify to their conclusions. Their cross examination discloses the fact that when it comes to any fact they have no reliable recollection about it. For instance, take the testimony of Colonel Blodgett: He testified that he didn't know of the sale of stocks and bonds by the Purchasing Committee to Mr. Hubbell for a good many months after the sale had taken place (vol. II, p. 371), and yet he drew the contract providing for the sale (ex. 298, vol. II, p. 1600). Now Colonel Blodgett was honest in this matter, but he had simply forgotten it.

Take the testimony of Mr. Hays (vol. II, p. 229). An examination of it will disclose that he attempted in his direct examination to testify to certain facts, but his cross examination shows that he had no accurate recollection about them.

The same is true with respect to the testimony of Mr. Pryor, who attempted to testify to things which happened in Des Moines many years before he was ever in Des Moines.

With reference to the testimony of Mr. F. M. Hubbell, his testimony would be of some value if it were necessary to use it, because it was based upon entries which he made in a diary at the time the transactions occurred and with which he refreshed his recollection,

but we have scarcely referred to his testimony because the same facts are so much more satisfactorily shown in the documentary evidence.

Counsel for the Wabash lay great stress upon the oral testimony of the parties that they didn't intend by the amendment to the articles of April 8, 1890, to affect the title to the terminal property. The fact is that none of them at the time thought there was any question about the title to the terminal property. They all understood that the title was in the terminal company and they simply were amending these articles and the record for the purpose of having them conform to the facts as they all understood them.

### **TITLE OF HUBBELL AND SONS TO THE SHARES OF STOCK.**

Counsel for petitioners challenge the title of Hubbell and Son to the stock they hold in the Des Moines Union, and charge that the shares were obtained by fraud from the Des Moines, northern and Western Railway Co. (Brief, p. 171 *et seq.*)

Nobody interested in the last named Company as creditor or shareholder complains and why should the Milwaukee which acquired its interest long after and with full knowledge of the facts?

The consideration paid may seem small at this time, but that was in January, 1894, when the prospects for all these properties were very unpromising. But if it was not a fair price, that was the grievance of shareholders or creditors. General Dodge was next to the Hubbells the principal shareholder and was advised of the facts at the time and invited to share in the purchase, but declined to do so (Rec. Vol. III, p. 1018).

Other shareholders were all satisfied and in the twenty-six years that have passed, no note of discontent has been heard from any of them.

The creditors have all been paid. The Metropolitan Trust Company has no complaint to make. It never had a lien upon this stock for it was in express terms excluded from its mortgage (Rec., Vol. II, p. 637). Moreover, the mortgage debt of the Metropolitan Trust Company has long since been paid.

All the grievances complained of by counsel are the concern of people who feel no grievance and who do not complain.

The Wabash of course had no right to complain; it had no interest in this stock at that time. Indeed, fifteen hundred shares of it had once been held by the Wabash and had been sold by it. And in the ratifying contract of 1897 this shareholding of the Hubbells in the Des Moines Union was explicitly set forth, recognized and affirmed.

This argument was in principal part in type when the brief for petitioners was received and in the main we must rely upon what we have set out in anticipation of its argument. Some matters of omission and of commission, however, we call attention to.

## **REPORTS TO THE EXECUTIVE COUNCIL.**

There is an attempt to make much of the reports made by the Des Moines Union to the Executive Council for purposes of taxation.

These reports will be found on pages 719 to 724, volume II, of the record.

These reports were made upon blanks prescribed by the state. Schedule 5 calls for a statement of "gross

earnings for the year," and is followed by a form divided into columns headed:

Name of line.....	a
From passengers .....	b
From freight .....	c
From express service .....	d
From mail service .....	e
From telegraph service .....	f
From track rent .....	g
From car rent .....	h
Miscellaneous .....	i

Now, the Des Moines Union, while incorporated in name as a railway company and being an operating company, had no earnings from any of these sources because it did not at that time do an independent business in any of these respects, but was rendering a terminal service for which it received compensation in the manner provided in the contract subsisting between it and the railway companies, and in explanation of the fact that it had no earnings to report of the kind called for, it made the statement that it was simply "a representative company," acting as an agency at Des Moines for the three railway companies. We conceive this characterization to be an entirely appropriate one for any terminal company, as it certainly is an agency through which the railway companies perform a part of the functions which they have undertaken to perform, and in respect of these operations performed by a terminal company, the terminal company is responsible as a principal to the shipping or traveling public. And as to each one of the railway companies using a terminal railway, that terminal is a part of its line in respect of each and all of the transactions in which it employs that terminal. So the terminal company may

well be called a representative and an agent, and some explanation was required to show why it had no specific earnings of the kind called for by the report, and there is nothing in this recital which could possibly operate by way of estoppel in behalf of any one. Its effect as evidence can be of no force whatever, because in the same report the Des Moines Union Railway Company states itself to be the owner of all of the terminal property which is here in question. The case is parallel with that, for example, of the Pullman Company, which, as to the public, is an agency of the railroad companies over which its cars are operated, employed by the railroad company as a convenient means of furnishing certain facilities to the traveling public; and the railroad company is responsible to its passengers in like manner and to the same extent as if the railroad company itself owned and operated the cars. It is a matter of general knowledge that these cars are owned by the Pullman Company, and also that the operation of the car itself, as distinguished from the operation of the train, is by the Pullman Company and not by the railroad company; but the fact that the Pullman Company is the agent of the railway company and that the railway company is responsible for its acts, does not at all impair the ownership of the cars by the Pullman Company, and neither does the fact of ownership of these cars by the Pullman Company and the operation of them by that company, relieve in any sense the railroad company from responsibility to the passenger.

Counsel say, p. 149, that:

“It is significant that the report signed and verified on February 16th, 1894, immediately succeeding the transaction of January 29, 1894, by which

Hubbell acquired his five-eighths interest in the Des Moines Company, states that the Des Moines Company "is the owner of the property hereinbefore described" (Rec., p. 724).

This is a plain intimation that the prior reports contained no such statement, else it could not be significant.

The record, page 719, contains a stipulation for the purpose of abbreviation that all the reports from 1888 to 1894 are in substantially the same form and "that each contains \* \* \* a description of its real and personal property." The stipulation is further to the effect that the "real property so described includes by specific description each of the lots and parcels of ground described in the following deeds," being the deeds by which How, Dodge, and the St. Louis, Des Moines and Northern Railway Company and the Des Moines & St. Louis Railroad Company had made the conveyance of the terminal properties to the Des Moines Union Company, and including all the land the Des Moines Union had acquired up to that time.

Of course, if there was significance in the fact that the reports first included a statement that the Des Moines Union owned this terminal property, after Hubbells acquired these shares, then too there was significance in the stipulated fact that the reports made by the Des Moines Union from the very first, that made for 1888, and for each and every year thereafter, contained the same statement. But the significance is of another kind.

The change made in the reports was simply that made under the head of general remarks. As to this Mr. Cummins says:



"A. I had nothing whatever to do with the operation of the Des Moines Union Railway Company; knew nothing about the details of its operation. At the time of the first report to which my attention was called, was presented to me, Mr. Hubbell, F. C. Hubbell, who I think then was President of the Company, was away from Des Moines, and I signed that report without even reading it. I think I ought to apologize to everybody for having done it; but I was a busy man, and it came up to me in a perfunctory sort of a way, and I did it. When the other came on, in some way or other, I don't remember how it was, my attention was called to that subject, and I myself prepared and put on it, my recollection is, the slip pasted over; anyhow, it was put in as a substitute for the remarks that were in the report as it came to me, and which were probably identical with those contained in the previous report that I had signed."

The case of the Chicago, Milwaukee & St. Paul Company vs. Des Moines Company, 165 Ia. 35, is cited on a question of estoppel but with suggestions of bad faith on the part of the Hubbells. The issues in that case are in no sense involved here and we have only to say that the claim of the Des Moines Union was based upon the facts that it had purchased and paid for the portion of the Railway in question, had expended large sums in maintaining and improving it and that when the Milwaukee bought the Northern lines, it was advised that the Des Moines Union claimed ownership of the tract between Farnam and Twenty-eighth Streets. The good faith of the Hubbells in attempting to sustain the ownership of the Des Moines Union in that litigation is evidenced by the fact that the decree of the trial court adjudged the title to be in the Des Moines Union and

there was a dissenting opinion in the Supreme Court approving that title.

There are a number of matters as to which it seems to us, counsel should have stated their views. Among these are the following:

(1) If the organization of the defendant Company was for the *sole* purpose of providing the corporate trustee referred to in the contract of 1882, as claimed on pages 99-100 of their argument, why did they organize a corporation having the power and assuming the obligation of a Railway Company and why did they organize a corporation for pecuniary profit?

(2) If it was the purpose to transfer to the defendant Company simply the legal title to the Terminal property then why the following:

(a) Why did the Des Moines Northwestern Railway Company, in whose name the title to no part of the Terminal stood, in January, 1895, pass a resolution authorizing its officers to transfer to the Terminal Company all of its interests in the Terminal Company of whatever kind and character?

(b) Why did the Northwestern Company, the Northern Company and the St. Louis Company, each, in their resolutions of January, 1885, authorizing their officers to convey this property, use this language:

"convey, assign and transfer to said company all its right, title and interest of whatever name and character in and to the real estate, franchises, choses in action, and rights in possession or contingent to all the property in the City of Des Moines east of Farnham Street in said City now held, enjoyed or claimed by either or all of the sig-

natories of said contract of January 2nd, 1882, or any agent or trustee thereof purchased, acquired, or held in pursuance of said contract." (Rec., Vol. II, p. 427.)

(c) Why did Col. Blodgett, whose integrity and ability are unchallenged, who had lived these transactions and who knew the intention better than can counsel or the Court, in preparing the deed of the St. Louis Company in carrying out these resolutions, prepare a warranty deed, and why did he formulate it so as to convey not only the property which stood in the name of that Company but also "all of the real estate within the City of Des Moines • • • also all its embankments, bridges, side tracks, • • • all its railroad property acquired or to be acquired and everything appurtenant to said railroad" (p. 458).

(d) Why did the Northern Company in its deed after describing the property which stood in his name use the following language:

"Together with all and singular the tenements, herditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest in the above described property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in or to the above described premises, etc." (p. 456).

(e) Why was it provided in the original articles of incorporation of the defendant Company that its capital stock should be issued in payment for the Terminal property?

(f) Why was it recited in the contract of May 10th, 1889, that the defendant Company owned this property?

(3) If the contract of May 10th, 1889, was supplemental to the contract of January 2, 1882, why does it not recite this fact?

### **INACCURATE STATEMENTS AS TO WHAT THE RECORD CONTAINS.**

On page 35 of the brief, counsel say the resolutions of November 5th and 8th, 1887, were addressed to the same object as the resolution of January 1, 1885, namely: the transfer of the trust properties to the Des Moines Company as corporate trustee. Substantially the same assertion is made at numerous other places in the brief. This is not true. The resolutions of January, 1885, do not purport to authorize Howe and Dodge as trustees or otherwise to convey any property but are restricted to the authorization of the three Railway Companies to a transfer of the ownership of the properties. The resolutions of 1887 are directed solely to Howe and Dodge as trustees except that the St. Louis Company is again authorized to transfer the ownership.

On pages 44 and 45 and at several other places in the brief it is asserted that at a meeting of the directors of the Des Moines Union Railway Company, held March 31st, 1883, a resolution was passed directing Col. Blodgett to prepare a thirty-year contract supplemental to the contract of January 2, 1882, and that the contract of May 10th, 1889, was prepared and executed in pursuance of that resolution and therefore counsel denominate the contract of 1889 as the "sup-

plemental contract." The facts are not as asserted by counsel. The resolutions are as follows:

"Resolved, That the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company and the Des Moines & St. Louis Railroad Company, or their successors or assigns, shall pay the operating expenses, taxes and interest on bonds that are or may be issued, after deducting any amount received from other sources for *rental*, pro-rated on a wheelage basis, and that said payments, including interest charges, shall be made monthly, and when for any reason, said Companies, or either of them, shall be or become in default in the making of any such payment, or any part thereof, on the day when the same shall be or become due and payable as aforesaid, interest shall be collected upon amount so in default to the time same shall be fully paid and satisfied.

Resolved, That Col. W. H. Blodgett be requested to prepare an agreement for *three* years from May 1st, 1888, based on the above resolution and covering in detail the conduct and operation of the Des Moines Union Railway Company. Said agreement to be approved and executed by all the lines now holding an interest in the property.

Said agreement shall provide that if at the end of six months from date of same, either party to the contract shall feel that the terms of same are unjust to them, and give notice to that effect, it shall be a matter for readjustment.

Resolved, That the terms and conditions on which the several lines now interested, or which may hereafter become interested, shall enjoy the use of these terminals, be fully set forth in a supplemental agreement to be made and executed between the Des Moines Union Railway Company and each of the lines using the said terminals."

The first contract mentioned is not to be for *thirty* years, but for *three* years. And the second contract which is referred to as supplemental is manifestly to be supplemental to the three years' agreement. The agreement of 1882 is not mentioned from beginning to end of the proceedings. The actual conclusion of the matter was that the parties determined to make one bite of the cherry and so they drew up the contract of May 10th, 1889, to be effective from May 1st, 1888, and to run for thirty years. And this contract was comprehensive and complete in itself and not supplemental to anything else. And in no document and in no letter or record entry is it referred to as supplemental. That designation came in with this litigation and is the contribution of counsel.

On pages 26 and 27 counsel state the provisions contained in the Articles of Incorporation of the defendant company. They call the defendant always the "*Depot Company*." They put the name in quotation marks and italicize it as if it were quoted from the articles.

The fact is that the defendant Company is not referred to as the "*Depot Company*," in the Articles of Incorporation, the amendments thereto, or in any resolution, contract, deed, or other document found in the Record.

Referring to the Stockholders' Meeting of April 8th, 1890, at which the Articles of the defendant Company were amended, counsel, on page 55, say it is conceded that no one held a proxy representing the persons and interests whom the Record showed were represented at that meeting and in support thereof refer to Mr. Hubbell's testimony on pages 1165-9. What Mr. Hubbell testified to was that at the time of taking his deposi-

tion in May, 1911, more than twenty-one years after the Meeting of April 8th, 1890, he was unable to find these proxies. Again referring to this same Meeting of the Stockholders, counsel on page 126, say, "no conference, however, took place between Blodgett and Cummins; Cummins alone redrafted the proposed amendments to the Articles." With respect to this Senator Cummins testified "it (the draft of amended articles of incorporation) was submitted to Col. Blodgett and I had a conference with him; possibly more than one" (p. 1201).

On page 90 counsel say, "after the concentration of the trust properties in the Des Moines Company no equitable tenant in common in such trust properties ever conveyed, released or otherwise relinquished to the Des Moines Company its equitable estate therein." This statement is substantially repeated on pages 108 and 153. While it would not be correct to say that so far as these statements assert that the three railway companies did not after once transferring this property to the defendant Company, again transfer it, they are not true, these statements are misleading in that they tend to induce the belief that the three Railway Companies did not at any time transfer the ownership to the defendant Company.

The transfer of the ownership was the result of the resolutions of 1885 and 1887 and the deeds executed in pursuance thereof and the payment therefor by the Terminal Company. All these transactions were at or prior to the concentration of the ownership in the Des Moines Company.

Speaking of "surplus earnings," counsel say, on page 186, "although the Record does not show the

amount of these accumulations at the present time, the testimony having been taken a number of years ago, it seems proper to state to the Court that these accumulations now amount to approximately Two Million Dollars (\$2,000,000.00)." There is nothing in the Record to sustain this statement and it is not true as a matter of fact. The Record does show that a substantial sum is involved in this issue.

### **DEFECTIVE STATEMENT OF AGREEMENT OF 1882.**

In their many references to and statements concerning the agreement of 1882, counsel for petitioners never quote, never mention and never refer to a significant clause in the tenth paragraph. This paragraph provides for the use of the terminal railroad by companies whose roads do not extend to Des Moines and that this may be had by any such company upon payment of a fair sum for rental and its proportion of the maintenance account." Up to this point counsel are free in quotation and comment. But the paragraph proceeds, "the rental to enure to the Companies hereto in the same proportion as the original outlay." Here is a distinct assertion of proprietary right and interest. The Company that owns a one-half interest in the property is to receive one-half the rental, and the company that owns but one-fourth is to receive but one-fourth of the rental. The rental is not to go to the reduction of operating expenses, but is in the nature of what the parties later called surplus earnings. And so if they had organized a depot company on the plan of this agreement, the stock representing the property would have had the benefit of these rentals. True the



parties did not organize such a company and being all agreed they were not bound to do so, and so too they might subsequently agree as they did to a different disposition of this particular rental, but the clause goes to show that the contributions to the enterprise as invested capital, and as well the stock afterward issued on account of such capital investment, as such stock was to have a value as property. So all consideration of this provision of the agreement was studiously avoided by counsel.

So, too, counsel avoid all mention of the letter of Hubbell to Miller, February 22nd, 1894. They argue and assert by implication that the Milwaukee Company was not informed as to the shareholding in the Des Moines Union Company. This letter was written at the very beginning of the negotiations that resulted in the Milwaukee finally acquiring the Northern lines, and before it had invested a dollar or done anything in the premises. In this letter Mr. Hubbell says:

“The Des Moines Northern and Western Railway Company own one-fourth of the capital stock of the Des Moines Union Railway Company. The Wabash own one-eighth, and five-eighths is owned by individuals.”

To bring this letter into the discussion would make absurd any suggestion that the Milwaukee Company was not fully advised of the rights of Hubbell and Son and that it did not buy subject to those rights. So the letter was left out of consideration as the easiest way of dealing with it.

Counsel say that our position results in a disregard of the terms on which local aid was voted to the Northern line by some of the townships through which it

passed. It is not for the Milwaukee to make such a defense. If such an issue had any place here, the Milwaukee Company would have no standing, for it would have no right to the line. One of the conditions on which aid was voted was that "said railroad shall never pass under the control of any of the lines constituting what is known as the Chicago pool or of the Chicago, Milwaukee and St. Paul R. R. Company" (Rec., Vol. II, p. 789). As the people who voted the aid are not complaining of what has been done here, no one else has any warrant for assuming to speak in their behalf.

### **RELATION OF MR. CUMMINS TO THE TRANSACTION.**

It is repeated over and over again in the brief of counsel that Mr. Cummins was the personal counsel of F. M. Hubbell and Son and in such way as to suggest that he acted in their behalf rather than in behalf of the Wabash and the Des Moines Union, whose counsel he also was, in the transactions in which he had part. But the evidence is conclusive that everything done or advised by him was done in the open, after long notice and full knowledge by all concerned. He did not come into the situation until in 1888. He had nothing to do with the contract of 1882 nor with the organization of the Des Moines Union, nor yet with the sale and transfer to it of the terminal properties. He did not draft the contract of 1889. Nor had he aught to do with the sale of the Des Moines Union stock to Hubbell and General Dodge. Col. Blodgett drew up the papers covering that transaction. The rough draft of the memorandum of sale of the stock is in evidence. (Rec., Vol. IV, p. 1600.) It is admittedly in part in

the handwriting of Hubbell and in part in the handwriting of Col. Blodgett (p. 1601). Mr. Cummins was not so much as present.

The important transaction in which Mr. Cummins had considerable part was the amendment of the Articles of Incorporation. This matter was months under way. It was under consideration at various meetings of the Company, stated and adjourned. It was the subject of correspondence and of discussion in personal conferences. The amendments were adopted only after grave consideration and the fullest deliberation and when the strong men of the interests other than Hubbell's were present, Col. How, for many years Vice President of the Wabash, and Hays, one of the ablest and most progressive railroad men in the country. General Dodge was not present in person, but he had been fully informed and he approved and was present by proxy. And when it came to the execution of the Articles in form for recording, General Dodge, Col. Blodgett, Col. How and Charles M. Hays signed and acknowledged the articles as officers and directors of the Des Moines Union. To say that these men were in any way misled or that they knew not what they did is the sheerest nonsense. They none of them ever said so. These men were all of them save Col. How, living while this suit was pending. The testimony of Col. Blodgett and Mr. Hays was taken. Neither of these men said that they did not understand the amendments at the time of their adoption or that any misrepresentations were made to them by anybody. Their recollection of matters is dim as is natural after so many years, but there is no impeachment of the integrity of anything that was done. And, indeed, the story of the Des Moines Union Company and the character of its

title to the property it held and the nature of its rights and interests therein were all fixed before Mr. Cummins came upon the scene.

The subtle suggestion of anything inviting criticism or distrust of his conduct is as baseless as the gross charges of the forgery of records made in the amended bill of complaint and abandoned without attempt at proof.

We pass now to a consideration of the question of "surplus earnings," the subject of the cross petition.

IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1919

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DES MOINES UNION RAILWAY COM-  
PANY, F. M. HUBBELL, F. C. HUBBELL  
and F. M. HUBBELL & SON,

Petitioners,

vs.

CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY and WABASH  
RAILWAY COMPANY,

Respondents.

No. 279

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On Writ of Certiorari to the United States Circuit  
Court of Appeals for the Eighth Circuit.

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**STATEMENT, BRIEF AND ARGUMENT FOR PETITIONERS**

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**STATEMENT.**

In discussing the questions involved in this cross-petition for certiorari we will continue to designate the parties as we have done in the case involving the main issue, believing that this will avoid confusion, the Milwaukee and the Wabash Companies as petitioners or

complainants and the Des Moines Union Railway Company and the individual parties as respondents or defendants.

The issue here is as to what are known in the record as

### SURPLUS EARNINGS,

being moneys received by the defendant company as compensation for switching services rendered companies other than the complainants or their predecessors, rentals from property owned by the defendant company and not at the time needed for terminal purposes, rental for station privileges, etc.

A very considerable portion of this fund was used to acquire additions to and make improvements on the terminal property, done by consent of all parties at the time. The unexpended balance of the fund, in the treasury of the defendant company on January 1st, 1907, the last date as to which we have testimony, was \$125,276.78 (Vol. IV, p. 1397). The record does not show the subsequent accumulations.

The question is who is entitled to this fund, the Des Moines Union Railway Company or the Milwaukee and the Wabash Companies?

This controversy involves the construction of the contract of May 10, 1889 (vol. II, p. 479). By the terms of this contract the defendant agreed, for the period of thirty years from May 1, 1888, to furnish to complainants' predecessors terminal facilities and certain terminal services. In consideration of this it was agreed:

“Section Three. Each of said parties of the second part for itself and its assigns, agrees to pay

to said party of the first part a sum of money to be ascertained as follows, to-wit:

1st. There shall be ascertained the amount required to pay five per cent interest upon the mortgage bonds of the party of the first part, one-twelfth of which, less any deduction hereinafter provided for, shall be payable monthly as hereinafter specified.

2nd. At the expiration of each month, or as soon thereafter as practicable, there shall be ascertained the expenses of maintaining and repairing the property of the party of the first part, including the maintenance and repair of tracks, depots, round houses, engine houses, etc., during the preceding month. And in like manner there shall be ascertained the taxes, general or special, levied upon or against said property and paid during the preceding month, or to be paid during the next succeeding month, and the insurance, if any, paid during the next succeeding month.

3rd. There shall be likewise ascertained the costs and expenses of every nature connected with the operation of said terminal station, freight and passenger depots, depot grounds, round houses, transfers and other properties, which is to include every item of expense or disbursement incurred or made by the party of the first part not hereinbefore mentioned, except the expenses specified in Section Nine hereof.

Section Four. Having so ascertained the monthly aggregate of all the items and sums mentioned in the preceding section, there shall be *deducted* therefrom the amount, if any, which *other* railway companies may be under obligation to pay by *virtue of contracts for the use of said property*, or parts thereof, for the preceding month, and the *remainder* shall be paid by the parties of the second part in the proportion that the *wheelage* of each of said parties bears to the entire wheelage

of all said second parties during such preceding month."

The question is, whether the complainants are entitled to credit for the items making up this fund, such items not being items "which other railway companies may be under obligation to pay by virtue of contracts for the use of said property, or parts thereof."

The Circuit Court of Appeals held that this fund belonged to complainants and it is this provision of the decree which defendants bring up for review by their petition for certiorari.



### **ASSIGNMENTS OF ERROR.**

The Circuit Court of Appeals erred in holding:

"I That the contention of petitioners that the only character of credit items to which the respondents were entitled under the contract "were such as were paid by some other railway by virtue of a contract for the use of the property" while a strict construction of the exact wording of the contract is not "a fair construction of the spirit of the agreement."

II. That its conclusion as to what was the "spirit of the agreement was based upon or warranted by the history of the transaction.

III. That its construction of the contract giving the surplus earnings to the respondents was justified by the reading of the contract in its entirety.

IV. And in its order, judgment and decree directing the District Court of the United States for the Southern District of Iowa to so modify its decree "that the surplus earnings belong to the railways, and to appoint a master under instructions to ascertain the part due each upon a wheelage basis."

## POINTS AND AUTHORITIES.

### I.

THE CONTRACT OF MAY 10, 1889, WAS CLEAR AND UNAMBIGUOUS, AND ITS INTERPRETATION DOES NOT REQUIRE A CONSIDERATION OF THE ACTS OF THE PARTIES THEREUNDER.

Where the meaning of a contract is clear in the eye of the law, the courts will not resort to the acts of the parties for its construction.

*Railroad Co. v. Trimble*, 10 Wall. 367.

*Russell v. Young*, 94 Fed. 45 (C. C. A.).

*Ralya v. Atkins*, 61 N. E. (Ind.) 726.

*Comptograph Co. v. Burroughs Co.*, 179 Ia. 83,  
l. e. 108.

A written instrument is ambiguous only when found to be of uncertain meaning by persons of competent skill and information.

*Comptograph Co. v. Burroughs Co.*, *supra*.

### II.

THE CONTRACT OF 1889 WAS RATIFIED IN ALL ITS TERMS BY THE CONTRACT OF 1897.

III.

IF RESORT IS HAD TO THE CONDUCT OF THE PARTIES AS A CONSTRUCTION OF THE CONTRACT, IT WILL BE FOUND THAT THE FUND WAS DEALT WITH ALWAYS AS BELONGING TO THE DEFENDANT COMPANY AND DISPOSED OF AS IT DIRECTED UNTIL JUST BEFORE THIS SUIT WAS BROUGHT.

## ARGUMENT.

### I.

THE CONTRACT OF MAY 10, 1889, WAS CLEAR AND UNAMBIGUOUS AND ITS INTERPRETATION DOES NOT REQUIRE A CONSIDERATION OF THE ACTS OF THE PARTIES THEREUNDER.

In the conduct of its business as a terminal company, the Des Moines Union Railway Company from time to time moves cars from and to industries located on its lines, for carriers other than complainants, for which it makes and collects a charge. It also leases certain pieces of its property not needed at present, for railway purposes, for which it collects rentals. It also leases certain portions of its union depot, for which it collects rentals. The funds received from these sources are what have been known in this record and in the books of the terminal company as "surplus earnings."

The Des Moines Union Company took possession of the terminal property May 1, 1888, as already shown, and began the operation thereof.

On May 10, 1889, the defendant company entered into a written contract with the predecessors of complainants, by which it granted to them a certain qualified use of the terminal property and agreed to furnish to them certain terminal services (vol. II, p. 479). In section 3 of the contract (p. 481) it was agreed that plaintiffs' predecessors should pay for such terminal services a monthly sum to be ascertained in a particular manner, and then section 4 of the contract provides:

“Having so ascertained the monthly aggregate of all the items and sums mentioned in the preceding section, there shall be deducted therefrom the amount, if any, which *other railway companies* may be under obligation to pay by *virtue of contracts* for the use of said property, or parts thereof, for the preceding month, and the remainder shall be paid by the parties of the second part in the proportion that the wheelage of each of said parties bears to the entire wheelage of all said second parties during such preceding month.”

The Circuit Court of Appeals said with respect to our position in this argument that “this latter contention is a strict construction of the exact wording of the contract” (Rec., vol. V, p. 2115). There is nothing in any other provision of the contract to qualify or impair the force of “the exact wording of the contract.”

Where a contract itself is clear and unambiguous, extraneous facts cannot be resorted to for the purpose of construction. This is the accepted rule.

In the case of

*Railroad Co. v. Trimble*, 10 Wall 367,

this Court, in discussing the effect to be given to the acts of the parties in construing a contract, l. c. 377, said:

“• • • Where there is doubt as to the proper construction of an instrument, this feature of the case is entitled to great consideration; but where its meaning is clear in the eye of the law, the error of the parties cannot control its effect. In this view of the subject, conceding that Trimble took this conveyance, not out of abundant caution and to solve in his favor a doubt which might otherwise possibly arise against him, but because he deemed

it necessary to give him a title which he did not already possess, his legal rights in this controversy are just what they would have been if that instrument had not been executed."

The case of

*Russell v. Young*, 94 Fed. 45 (C. C. A.),

involved the construction of a contract between an attorney and his client with respect to compensation for legal services. One of the claims made by the plaintiff in the case was that the contract had been construed by the act of the parties. The opinion was written by Circuit Judge Lorton, and referring to the question under consideration, he says (p. 47):

"Plaintiff offered to prove that he had deducted 7½% of every cash collection made by him and remitted the remainder to Mr. Carlisle with a statement showing that he had retained 7½% as compensation for the collection of the particular remittance, and that no exception had ever been taken by Mr. Carlisle to this construction of the contract. This evidence was offered for the purpose of showing that the parties had construed the contract according to the present contention of plaintiff in error. The evidence was rejected upon the ground that the contract was not doubtful and needed no such sidelight in its interpretation. Evidence as to the particular construction by the parties of a doubtful or ambiguous instrument is often of great importance, but such evidence can never control the effect unless the legal meaning is doubtful. *Railroad Co. vs. Triable*, 10 Wall 367, 377; *Lang Co. vs. Doll*, 35 Md. 89; *Fogg vs. Insurance Co.*, 10 Cush. 337. To give effect to a written agreement according to an erroneous construction placed upon it by the parties would not be to con-

strue, interpret and enforce the written agreement upon which the action is brought, but to enforce a new and different contract."

The case of

*Ralyn v. Atkins*, 61 N. E. (Ind.) 726,

was a suit upon a contract which, it was claimed, had been construed by the acts of the parties. Referring to this subject the court says (p. 728):

"\* \* \* This action is founded on the contract in writing, executed by the parties, and it is sought to enforce the same as executed, not modified by any oral agreement or otherwise. It is true that when the terms of a contract are of doubtful or ambiguous meaning, the construction placed on the same by the parties by their conduct and acts may be shown for the purpose of arriving at their true intention. The construction placed on such contract by the parties is entitled to great weight and may be controlling. \* \* \* When, however, the contract is free from ambiguity and its meaning is clear, such rule is not applicable. \* \* \* In *Morris vs. Thomas*, 57 Ind. 322, this court said: 'If there is any obscurity, uncertainty or ambiguity in the terms of a contract, then the acts of the parties in connection therewith, as suggested by appellant's counsel, would furnish valuable aid in the construction of the contract; but where, as in this case, the terms of the contract are plain, intelligible and free from doubt and uncertainty, rules of construction are unnecessary and of no possible service. In such a case it is certainly not the province of the courts by any rules of construction to make another and entirely different contract for the parties from the one they made for themselves.'"

In the recent case of

*Comptograph Co. v. Burroughs Co.*, 179 Ia., l. c.  
108,

the Supreme Court of Iowa had to say upon this subject the following (p. 473):

"we understand the law to be that where the parties to an agreement have acted upon a certain interpretation of it, this interpretation will not be followed by the courts where the contract is not ambiguous, since a construction contrary to the plain meaning of the instrument is necessarily erroneous, and the parties are not bound by their erroneous construction of it. *Spencer v. Millisack*, 52 Iowa, 31, 2 N. W. 606; also *Railroad Company v. Trimble*, 10 Wall. (77 U. S.) 367, 19 L. Ed. 948. But where there is doubt as to the proper construction of an instrument, the construction put upon it by the parties is entitled to consideration. *Railroad Company v. Trimble*, *supra*.

A written instrument is ambiguous only when found to be of uncertain meaning by persons of competent skill and information. 1 Greenleaf on Ev. (Lewis Ed.) § 298."

Turning now to an examination of the contract of May 10, 1889, for the purpose of determining whether or not it is ambiguous with respect to the subject matter of this inquiry. Two things must be kept in mind, because, in the language of the Supreme Court of Iowa, "a written instrument is ambiguous only when found to be of uncertain meaning by persons of competent skill and information." (*Comptograph Co. v. Burroughs*, *supra*.)



One of these facts is that the charter of the Des Moines Union Railway Company contained, among other things, the following (vol. II, p. 420) :

"The general nature of the business to be transacted shall be the construction, ownership and operation of a railway in, around and about the City of Des Moines, Iowa, including . . . the transfer of cars from the line or depot of one railway to another, or from the various manufactories, warehouses, store-houses or elevators to each other or to any of the railways or depots thereof, now constructed or to be hereafter constructed, in or around said City of Des Moines."

When the Des Moines Union Railway Company accepted this charter it not only acquired the powers, but assumed the obligations of a common carrier, and included in this was the power and obligation to perform switching services not only for complainants and their predecessors, but for any other railroad or shipper who desired transportation over its line. In other words, the duties and obligations of the Des Moines Union Railway Company were not confined to serving the railways parties to the contract of May 10, 1889, but it owed the duty of performing the services of a common carrier for any other railway company with which it might connect, or any shipper who desired to use its line for transportation. For these services the Des Moines Union Railway Company was entitled to compensation. Not only this, but it had long been the custom of railway companies to lease privileges in their depots, to charge storage for baggage, etc. It was therefore certain that from these sources the defendant company would receive an income, whether great or small.

The other fact is that this contract of May 10, 1889, was drawn by Col. Wells H. Blodgett, then general solicitor for The Wabash Company, who, as the record shows, had been exclusively employed in the railroad service for years prior to the drawing of this contract and therefore knew the sources of revenue upon which the defendant company might depend.

Knowing by whom this contract was drawn, we would naturally expect to find it clear and unambiguous and its provisions stated in no uncertain terms, and in this expectation we are not disappointed. The language selected by Colonel Blodgett to evidence the agreement is as follows (vol. II, p. 481):

“Having so ascertained the monthly aggregate of all the items and sums mentioned in the preceding section, there shall be deducted therefrom the amount, if any, which *other railway companies* may be under obligations to pay by virtue of *contracts* for the use of said property, or parts thereof, for the preceding month.”

Now there are three things which must appear before the complainants are entitled to have a credit upon their accounts, and these three things are the following:

- (a) The sums must be paid by other railway companies.
- (b) They must be paid by virtue of a contract.
- (c) They must be paid for the use of the property.

The idea that the complainants are entitled to credit for any items which do not come within the above clas-

sification is excluded by the very language of the contract following that above quoted, which is as follows:

“and the *remainder* shall be paid by the parties of the second part.”

The word “remainder” means the aggregate of the sums ascertained as provided in section 3 of the contract, after deducting the items specifically authorized in section 4.

It is undisputed that almost from the beginning the terminal company did receive payments from other railway companies by virtue of the contracts for the use of this property, and that these sums have been consistently credited upon the bills of the complainants and their predecessors.

For instance, the record shows that the Chicago Great Western Railway Company has for many years paid large sums annually for the use of the terminal property, and that likewise other railroad companies are paying such items, but all these sums, as we have said, have been credited to the complainants and their predecessors.

Upon this subject Mr. E. B. Pryor, a witness for the complainants, and vice president of The Wabash Company, and who had examined the books of the terminal company for the purpose of qualifying himself as a witness, testified in substance:

The Wabash, and the Chicago, Milwaukee & St. Paul Railroad Company, are the only present users of the terminals who are successors to the original parties of the second part to the contract of May 10, 1889. The other railroads which are now using the terminals, or parts of them, are the Chicago, Great Western, the

Chicago, Burlington & Quincy, the Minneapolis & St. Louis Railroad Company, and the St. Paul & Des Moines Railroad Company. The amounts which these companies are under obligation to pay by virtue of their contracts for the use of the property for the preceding month, using the language of the contract, 'are deducted from the bills rendered to your Company and the Chicago, Milwaukee & St. Paul Railway Company.' Among these amounts the Chicago Great Western Railroad Company, and its predecessor, the Chicago Great Western Railway Company, has been paying one-third of all the taxes as a part of the rent, which it pays, and an amount equal to one-third of the maintenance and other amounts which are specifically set out in the contract. (Vol. II, p. 353.)

We have, therefore, the situation that it was perfectly apparent that the terminal company would have earnings of the character which make up the fund in controversy, and we have a contract drawn which specifically confines the credits to which the complainants are entitled, to items other than those under consideration, and the contract excludes the items under consideration by specifically providing that the remainder should be paid by the tenant companies. Language more appropriate to carry out what was in the mind of the parties could scarcely be selected.

**Even if we resort to the conduct of the parties as an aid to construction, the result is the same.**

As we understand counsel for petitioners they do not really contend that the contract is ambiguous, but ignoring the rule of law which we have cited they contend that the conduct of the parties under the contract put a construction upon it which gives to them these surplus earnings.

What was that conduct? We concede that at the beginning the Des Moines Union credited these earnings, then very small, to the railway companies. Why it did this the record does not show. There is no testimony indicating that there was any discussion of the subject. These earnings belonged to the Des Moines Union and it could do with them what it pleased. The ultimate beneficiaries of these revenues at that time were very much the same whether they went to the Des Moines Union or to the tenant companies.

The first record action taken with respect to them was the resolution of the Des Moines Union of February 11th, 1891 (Rec., Vol. II, p. 497), as follows:

“It is ordered that the rents collected for the use of the Company's real estate and the switching charges paid in be credited on bills of *the different tenant companies occupying this company's terminals*, giving to each company its share ascertained by wheelage.”

Now this had been done for a few months previously. This resolution was the action of the Des Moines Union, disposing in the way indicated of its own revenues. The credit, it is to be observed, was to be allowed to all the tenant companies, including the Chicago, St. Paul & Kansas City Company, which was neither a shareholder in the Des Moines Union nor a party to the contract of 1889. If by that contract these revenues belonged to the petitioners' predecessors, the Des Moines Union had no right to give them in part to the C., St. P. & K. C. Company, for it was not a party to the contract. What that Company paid under its own contract with the Des Moines Union was not under the contract of 1889 to be deducted from the expense

charges against the other railway companies, and it was entitled to nothing on the score of receipts by the Des Moines Union on switching and rental accounts. But the Des Moines Union had the right to make concessions from its own revenues to any or all of its tenant companies. That the C., St. P. & K. C. Company shared in the credits to the tenant companies, so long as they were allowed is shown by Rec., Vol. II, p. 279 to 313.

This concession for whatever reason made ceased January 7th, 1892, less than three years after the contract of May, 1889, when the directors of the Des Moines Union passed the following resolution (Rec., Vol. II, p. 499) :

“Whereas, this Company is in need of a cash capital with which to purchase supplies and pay current bills, which come in before it receives its monthly revenue from the tenant companies :

Therefore, be it resolved that until the further action of the Board, the sums received as rents of real estate and all switching charges shall not be credited upon the accounts of the tenant companies, but shall be used for the aforesaid purposes.”

In other words, the Des Moines Union wanted a working capital fund and got it by its own action in withdrawing from the tenant companies, all of them, what before it had allowed them.

And this new order was to continue until further action of the Des Moines Union. Strange that the disposition of these revenues whatever that might be, should from the beginning be determined by the sole action of the Des Moines Union if it was not the owner of them.

No action was ever had respecting these revenues by any other company until many years after, in 1906, when this suit was in the brew.

And after January, 1892, these revenues were never again credited to any of the tenant companies, but they were used entirely in the acquisition of additional property, in improvements and in the accumulation of surplus.

The first reference to surplus earnings in the record after the passage of the resolution of January 1, 1892, is contained in the record of a meeting of the board of directors of the terminal company held May 26, 1894, (ex. 130, vol. IV, p. 1338), where it was resolved to pay what is known as the Hill mortgage of \$4,000 out of this fund. At this meeting the only Wabash representative present was its local attorney, Mr. A. B. Cummins.

At the meeting of the board of directors held June 7, 1894, at which Charles M. Hays, general manager of the Wabash Company, was present, the following appears in the record:

"The records of the meeting held May 26th, 1894, were read and the proceedings therein set forth were, on motion, unanimously approved and agreed to with the exception of the Resolution to pay the mortgage upon lot seven (7) in block fifteen (15) of the Original Town of Fort Des Moines amounting to \$4,000.00, out of the funds on hand realized from rents of real estate and from switching cars. On motion to approve this part of the record, Mr. Hays wanted further time." (Ex. 132, vol. IV, p. 1340.)

At a meeting of the board, held July 10, 1894, the following appears of record (ex. 133, vol. IV, p. 1341):

“On motion of F. M. Hubbell, the treasurer was directed to pay the Abbie Bechtel mortgage of two thousand dollars (\$2,000) with accrued interest thereon, upon the south forty-four (44) feet of lot ten (10) in block thirty-five (35) Fort Des Moines, Iowa, upon which is situated in part, the Freight House of this Company; and upon payment of same to have the mortgage cancelled of record, provided, however, that the written consent of Chas. M. Hays could be procured.”

On June 19, 1894, Mr. Hays wrote Mr. Hubbell as follows (see cross examination of Hays, vol. II, p. 256):

“Referring to the M. L. P. Hill note of \$4,000 which you reported at a meeting of directors of the Des Moines Union Railway Company, held June 7th, as having been paid by you, which you suggested should be taken out of the surplus earnings of the Des Moines Union Railway, and upon which I withheld my vote until I could consult with President Ashley, of the Purchasing Committee, *after discussion of the matter with Mr. Ashley and General Solicitor Blodgett, they concur in the opinion that a proper disposition of the payment will be to charge it to the surplus earnings as proposed*, and you may therefore be governed accordingly. Please ascertain from treasurer and advise me what balance this still leaves in the hands of the treasurer to the credit of ‘surplus earnings.’ ”



And again on August 9, 1894, Mr. Hays wrote Mr. Hubbell (see vol. II, p. 256) as follows:

“I have yours of the 7th showing surplus earnings of Des Moines Union Railway on hand July 1st of \$15,312.89, and after paying note of L. P. Hill of \$4,000 interest, \$180, \$11,132.89 on hand, I approve of your application of \$2,000 of this amount to the payment of the Abbie-Bechtel mortgage.”

Defendants' exhibits 312 to 316 inclusive (vol. IV, pp. 1623-7), are letters passing between Mr. Hubbell and Mr. Hays in October and November, 1894, in reference to the application of surplus earnings to the payment of the indebtedness on the Heath property, which application Mr. Hays approved.

In pursuance of this correspondence the board of directors of the terminal company, at a meeting held November 14, 1894 (ex. 135, vol. IV, p. 1343), at which Mr. Hays was present by proxy to A. B. Cummins, a resolution was passed appropriating out of the surplus earnings \$10,775.00 to apply upon said indebtedness and to pay the balance of said indebtedness, amounting to \$40,000.00, and evidenced by unmatured notes out of the surplus earnings as the notes became due, and the following was also enacted:

“The words ‘Surplus Earnings’ as herein used, mean that fund arising from the rentals of such real estate and from switching charges.”

On November 19, 1894, the same subject was considered by a meeting of the board of directors of the terminal company (ex. 136, vol. IV, p. 1344).

At the annual meeting of the stockholders held February 14, 1895 (ex. 138, vol. IV, p. 1347), there were present, among others, C. M. Hays, general manager of the Wabash Railroad, Mr. H. L. Magee, a representative of the Wabash, the Purchasing Committee of the Wabash by Charles M. Hays, proxy, and the Des Moines Northern & Western Railroad Company by F. M. Hubbell, president. The following appears in the record:

"On motion, the minutes and proceedings of all meetings of the Board of Directors and Stockholders held during the year 1894, were read and approved and all of the acts of the Board of Directors and Officers done during year 1894, were confirmed and ratified."

In August, 1896, Mr. J. Ramsey, Jr., then vice president and general manager of The Wabash Railroad Company, wrote to F. C. Hubbell, president of the Des Moines Union Railway Company (ex. 357, vol. IV, p. 1666), as follows:

"This will be handed you by Mr. Pryor, our assistant auditor, whom I have requested, in company with Mr. Garrett to go to Des Moines, and look over the methods and cost of operating the joint terminals.

I do not do this because I have any doubt or apprehensions as to the property being handled in the best way possible for the interests of all, but only in order to fully post myself on the whole situation at that point.

I find our company has not been in the habit of receiving any statement from the Des Moines Union, other than the one showing the cost of operation, and we have no information, whatever, as to the revenues of the company, their general dis-

position, etc., nor any of the detailed information which I think we should have in order to keep properly informed.

Will you kindly have the officers of the Des Moines Union furnish Messrs. Pryor and Garrett every opportunity necessary for them to become properly posted in the premises."

From this it appears that at this time the new vice-president and general manager of the Wabash learned all the facts as to the way in which the business of the Terminal Company was conducted, what its revenues were and how its accounts were kept.

## II.

### THE RATIFICATION CONTRACT OF 1897.

Of greatest significance here is the history of the proceedings which ended in the contract of July 31st, 1897.

The original railway companies parties to the contract of 1889 were no longer operating their respective properties and question seems to have arisen as to whether the contract was binding upon their successors. This doubt affected the market value of the Des Moines Union bonds, which in large part were held by the Wabash Company. Mr. Ashley, President of the Wabash, wanted that doubt removed. On December 28th, 1896, he wrote to Mr. Hubbell as Secretary of the Des Moines Union as follows (Rec., vol. IV, p. 1673):

"Permit me to remind you of our understanding to the effect that you would have prepared at once a new agreement for the tenant company of the Des Moines Union Railway Co. to sign, this new agreement being considered necessary on ac-

count of the foreclosure of the Des Moines & Northwestern. I understand that the agreement will be exactly as before, except that the time must be made to correspond with the life of the bonds, or to be made for a period to extend beyond their maturity.

I write now for the purpose of urging the immediate preparation of this agreement, as without it we cannot well dispose of our bonds. When it is ready please forward it to Colonel Blodgett, asking him to examine the same and to send it to me as soon as possible. I should not suppose it would take long to have the agreement prepared and as time in this case is of importance I hope you will see that the paper is gotten under way at once. Perhaps you have already taken the matter in hand and if so, so much the better."

On February 3, 1897, Mr. Hubbell wrote to Colonel Blodgett (ex. 367, vol. IV, p. 1679), enclosing the proposed new contract prepared by Mr. Cummins. This proposed contract is defendants' exhibit 383 (vol. IV, p. 1703).

It is significant to note that so far as the passages in the proposed contract under which the subject of surplus earnings arises are concerned, the proposed contract which Mr. Cummins prepared and which was forwarded to Colonel Blodgett was identical with the contract of May 10, 1889, the provision being contained in section 3 as follows:

"Having so ascertained the monthly aggregate of all the items and sums mentioned in the preceding section, which shall embrace every item of expense or liability of whatsoever name or character, there shall be deducted therefrom the amount, if any, which other railway companies may be under obligations to pay by virtue of con-

tracts for the use of said property or parts thereof, for the preceding month, and the *remainder* shall be paid by the Des Moines & St. Louis Company," etc.

Immediately upon this proposed contract coming into the hands of Colonel Blodgett, the question of what was to be done with the surplus earnings was raised. The form of the question, however, was not as to who was entitled to the surplus earnings under the contract of May 10, 1889, but what change could be made in the contract so as to entitle the tenant companies to such surplus earnings, or a portion thereof. It seemed to be conceded that under the contract of May 10, 1889, the surplus earnings belonged to the terminal company, and it was Colonel Blodgett's idea that this feature of the contract should be changed.

In a letter of Colonel Blodgett to Mr. Hubbell dated March 26, 1897 (ex. 377, vol. IV, p. 1687), Colonel Blodgett encloses two forms of section 3 which he proposes to be inserted in place of section 3 as prepared by Mr. Cummins. These forms are exhibits 378 and 379 (vol. IV, pp. 1688-91), and provide for crediting the surplus earnings upon the accounts of the tenant companies. If these tenant companies were entitled to credit for these surplus earnings under the provisions of section 3 of the contract as prepared by Mr. Cummins, which we have shown are the same provisions as are contained in the contract of 1889, then, of course, it was unnecessary for Colonel Blodgett to insist upon any change in this section. The clear inference is that in the opinion of the parties neither the proposed contract as drawn by Mr. Cummins, nor the contract of 1889, entitled the tenant companies to these earnings.

The subject of the surplus earnings was threshed out by the parties, as will be ascertained by the following exhibits (vol. IV): 367-a, 368 (p. 1680), 375-6 (pp. 1684-7), 382 (p. 1694), 377 (p. 1687), 378 (p. 1688), 379 (p. 1689), 380 (p. 1691), 381 (p. 1692), 384 (p. 1712), and 385 (p. 1723).

It will be noted from an examination of these exhibits, that nowhere do the Wabash officials take the position that they were entitled to a credit for these surplus earnings, either under the contract of 1889, or because of any alleged construction put thereon by the acts of the parties, but their contention is that in this new contract a change shall be made with respect to the surplus earnings, which would give to the tenant companies such earnings, or a portion thereof.

The result of the conferences and negotiations was what is known as the ratification contract of July 31, 1897 (vol. 11, p. 506), which was a ratification and adoption of the contract of May 10, 1889, except as therein changed, and no change was made in the language of the latter contract under which the question of surplus earnings arises.

This ratification contract was executed by the Des Moines Union Railway Company on the one hand, and by the complainant, The Wabash Railroad Company, and by the Des Moines Northern & Western Railroad Company (predecessor of the Chicago, Milwaukee & St. Paul Railway Company) on the other.

This contract, referring to the contract of May 10, 1889, provides among other things as follows:

"And the Wabash Company for itself agrees to make the *payments therein provided for at the times and in the manner prescribed for the said*

*Des Moines & St. Louis Railroad Company* so long as it operates the railroad of the said *Des Moines & St. Louis Company*."

The Complainant, the Wabash Company, agreed therefore, to make payments to the *Des Moines Company*, not according to any modification of the contract of May 10, 1889, or any subsequent construction thereof, but strictly, as "*therein provided*." It was provided in the contract of May 10, 1889, that the *Des Moines & St. Louis Company* would pay its share of all the expenses of the *Des Moines Company* ascertained on a wheelage basis, except there should

"be deducted therefrom the amount, if any, *which other railway companies* may be under obligation to pay by virtue of *contracts* for the use of said property or parts thereof, for the preceding month."

It therefore appears that the attempt to change the contract with respect to the disposition of the surplus earnings was abandoned, and it was agreed that the Wabash Company should pay in accordance with the terms of the original contract.

With respect to the predecessor of the Chicago, Milwaukee & St. Paul Railway Company, the contract provided (p. 508):

"And the said *Des Moines, Northern & Western Company* for itself agrees to assume all the obligations of a lessee railroad company as prescribed in the said contract for the entire term named therein, and as though it had been named in and was a party to the said contract *when originally made*, and to pay to the said *Des Moines*

*Company at the times and in the manner therein prescribed the sums of money which may become due, computed according to the terms and provisions of the said contract with respect to a tenant company."*

Here is the Des Moines, Northern and Western bound like the Wabash to pay at the times and in the manner prescribed by the contract of 1889 the sums of money which might become due, computed according to the terms and provisions of that contract.

What Mr. Ashley wanted in the new contract was placed there. The obligation imposed upon the tenant companies by the contract of 1889 were expressly assumed by their successors.

### III.

#### SUBSEQUENT CONDUCT OF THE PARTIES.

The primary purpose of this contract of July, 1897, was, as we have said, to help the salability of the bonds of the Des Moines Union Company on the general market. The Wabash Company held the largest block of these bonds and evidently wished to dispose of them. So far as concerned the Des Moines Union Company and the tenant railway companies and their relations *inter sese* the contract of 1889 needed no amendment because there was the tacit agreement between all of them that the railway companies had succeeded to the rights of their predecessors in this contract. But a prospective purchaser of bonds would desire something more than this and that would be a binding obligation upon the railway companies to perform the terms of the contract and to make the payments therein prescribed, and so the contract of 1897 was made and this purpose of improving the credit of the bonds was



accomplished. But there was another thing that might be done to help to this same end of making bonds salable and that was to list them upon the New York Stock Exchange, where merchants in such wares most do congregate, and Mr. Hubbell, on behalf of the Des Moines Union with the approval and aid of Mr. Ashley as President of the Wabash Company, made application in due form to the Stock Exchange for the listing of these bonds. The rules of the Exchange seemed to require that the resources available for payment of the bonds, principal and interest, shall be disclosed, so that dealers in them, buyers and sellers, may be able to form some opinion as to their intrinsic value.

The Record, Vol. 4, pages 1734 and following, contain a full history of this listing of the bonds. The Stock Exchange required a "complete financial statement of said corporation for a period covering at least one year before its reorganization: i. e., a detailed statement of its earnings and receipts from every source, a detailed account of all expenditures and the amount of its outstanding indebtedness in detail of every description and a balance sheet of its books, etc., etc." (p. 1736).

Responding to this requirement, the Des Moines Union Railway Company on September 28, 1897, in its application to the Committee on Stock List of the New York Stock Exchange, set forth its ownership of the terminal properties and the various functions which it performed and then said (p. 1744):

"The terminal facilities offered by this Company are at present shared by the Des Moines & St. Louis R. R. (owned by the Wabash R. R. Co.), the Chicago Great Western Railway, and the Des Moines, Northern & Western Railroad. Each of

these companies for itself has agreed to pay monthly, as rental for the facilities used, a sum equal to one month's interest on the outstanding bonds, besides they pay for their proportion of the expense of operation. *In addition, the Company derives considerable revenue for switching cars for other railroads (not tenants) and in rents for the use of various portions of the property."*

In this same application it made a statement of receipts and expenditures for the year ending July 30, 1897, as follows:

### “RECEIPTS AND EXPENDITURES

For the year ending June 30, 1897.

#### RECEIPTS.

Amount Rec'd from The Wabash R. R.	
Co. on wheelage basis.....	\$31,251.14
Amount Rec'd from Des Moines N. &	
W. Ry. Co. on wheelage basis.....	58,447.66
Amount Rec'd from Chicago G. W. Ry.	
Co. on a wheelage basis.....	47,190.71
Amount Rec'd for outside switching	
and rent of real estate.....	10,282.42
	<hr/>
	\$147,172.00

#### EXPENDITURES.

Interest paid on First Mtge. Bonds.....	\$28,450.00
Taxes for year ending June 30th, 1897	6,260.25
Conducting Transportation .....	66,147.27
Maintenance of Way Structures.....	15,935.55
Maintenance of Equipment.....	13,679.33
General Expenses .....	6,390.11
	<hr/>
	\$136,889.51
Surplus .....	\$10,282.49”

This application was forwarded by Mr. F. M. Hubbell as Secretary of the Des Moines Union Railway Company to Mr. Ashley as President of the Wabash Company and by Mr. Ashley was presented to the proper Committee of the Stock Exchange and by that Committee it was approved and bonds were listed as desired.

Here is a statement made for the use of the investing public and we have here the direct statement in the text of the application that in addition to the sums which the Railway Companies have agreed to pay monthly "the Company (the Des Moines Union) derives considerable revenue for switching cars for other railroads not tenants and in rents for the use of various portions of the property." And in the statement of receipts and expenditures for the preceding year we have set forth in detail what the Des Moines Union received from each of the tenant companies and the additional item of revenue "for outside switching and rent of real estate, \$10,282.42." Deducting the various charges to which the revenues of the Des Moines Union were subject there was left the surplus of \$10,282.49, the amount received for outside switching and rent of real estate. This puts the matter absolutely beyond controversy. These surplus earnings belong to the Company which owned the property from which they were derived and they were morally pledged to every purchaser of one of these bonds as resources out of which the bonds, interest and principal, might be paid.

The contract of 1897 ratified the terms of the contract of 1889 in every respect. It made two changes of any kind and only two. The first was a change as to parties. It substituted living and active parties for

those who had become defunct or moribund. And it set out in full and in detail the shareholding in the Des Moines Union Railway Company. This second change showed the ownership of the stock to the extent of 2,500 shares, a majority of all, in private hands, owned by F. M. Hubbell and Son. The contract in its entirety was one of value to the Des Moines Union as such, and to its shareholders ratably, for it recognized in the property of the Des Moines Union the ordinary and usual incidents of property, that is the right of the owner to the rents, issues and profits thereof. The contract was one of value during its term, to the Des Moines Union because it reserved to that company the earnings that it derived from switching done by it for outside parties and the rentals received from property not in railroad use. And so it was of value to the shareholders, and equally so, whether these earnings were distributed as dividends or reinvested in the property. And this contract was made, ratifying that of 1889 according to its very terms, with the Hubbells asserting their ownership, which indeed was undisputed, of the 2,500 shares of the capital stock of the Terminal Company, and asserting, what was agreed to, the ordinary and usual rights incident to such ownership. Nothing here was furtively done, but everything desired upon the one side or the other was openly proclaimed. Nor was anything done in haste. Beginning the matter in December, 1896, it was not concluded until July 31st, 1897. Here was a case where counsel was perhaps little needed, for the representatives of the parties interested were men capable and experienced in such affairs. But counsel attended at every stage. And when it was concluded so far as adjustment between the parties was concerned on July 31st, 1897, they pro-

ceeded to deal with the public, consistently with the arrangement between themselves, in their listing of the securities upon the Stock Exchange of New York. And between themselves they did the same.

The execution of this contract was ratified by the directors of the Des Moines Northern & Western Railroad Company on September 7, 1897 (ex. 218, vol. IV, p. 1497), and by the directors of the Wabash Company October 5, 1897 (ex. 237, vol. IV, p. 1540).

At no time, either before or after the execution of the ratification contract, did The Wabash Company make any claim to these surplus earnings until just prior to the commencement of this suit, and as a step preliminary thereto.

Turning now to the attitude of the Chicago, Milwaukee & St. Paul Railway Company with respect to these surplus earnings, it will be noted that its predecessors never at any time made any claim to them. The first interest, either direct or indirect, which the Milwaukee Company acquired in the property of its predecessors was by virtue of a contract with F. M. Hubbell & Son, made in 1894, and which was negotiated between Mr. Roswell Miller, president of and representing the Chicago, Milwaukee & St. Paul Railway Company, and Mr. F. M. Hubbell, representing F. M. Hubbell & Son and the Des Moines Northern & Western Railroad Company. During the negotiations leading up to this contract, Mr. Miller was advised by Mr. Hubbell that the only interest which the Des Moines Northern & Western Railway Company had in the terminal property was the interest represented by its 1,000 shares of stock, and that 2,500 shares of stock in the terminal company was owned by the defendant, F. M. Hubbell & Son.

The Milwaukee Company in 1899, having acquired all the outstanding stock and bonds in the Des Moines Northern & Western Railway Company, took the title to the property of the latter company and consolidated such property with its own, and thereafter the Milwaukee Company had such interest in the terminal company as it acquired from the Des Moines Northern & Western Company.

On November 22, 1898, Roswell Miller, president of the Milwaukee Company, wrote Mr. Hubbell (ex. 411, vol. IV, p. 1758), in reference to the terminal contract, evidencing the fact that he had examined and understood the contents thereof.

On January 16, 1899, Mr. Myers, who was then secretary of the Des Moines Northern & Western Railroad Company, and also secretary of the Milwaukee Company, wrote asking for additional copies of this contract.

On March 7, 1904, one H. G. Haugan, who seems to have been a new comptroller of the Milwaukee, writes to Mr. J. A. Wagner, defendant's superintendent, the following (ex. 504, vol. IV, p. 1843):

"I understand that at the Des Moines Union station there are a number of offices rented, also news stand, lunch room and other privileges which are not accounted for in your monthly statements and bills. I believe you are also collecting rents on certain property on which we have to pay our proportion of taxes.

I do not remember having seen any statement or account of rents collected by your company.

It seems to me that these rents, etc., should be applied towards paying part of the operating expenses similar to the manner in which the business is conducted at the Union Depots at Chicago, Omaha, St. Paul and Kansas City."

On March 22, 1904, Mr. Wagner replies to Mr. Haugan as follows (ex. 505, vol. IV, p. 1843):

“Replying to your letter of March 7th, our auditor sends your Mr. Winne each month a statement of all rentals of the character to which you refer. These rentals have nothing whatever to do with the proportion of the expense to be paid by your company. Our monthly bills against you for such expenses are made out in strict accord with our terminal contract. We have frequently in the past few years, explained the matter to the various officials of your company in response to their inquiry.”

Of course the letter of Mr. Haugan to Mr. Wagner above quoted cannot be considered as a protest on the part of the Milwaukee to the terminal company's retaining these earnings, nor a claim that the tenant companies were entitled to them under any contract. His thought that they should be credited with these earnings is based, not upon the contract, but upon the fact that the Milwaukee had some different sort of an arrangement with respect to terminal property at other places. This correspondence, however, shows two things:

*First.* That the Milwaukee Company knew of these earnings, because the terminal company was furnishing to the auditor of the Milwaukee Company a statement of them each month; and

*Second.* That the Milwaukee Company knew they were not being credited with these earnings, and the reason therefor was that the Des Moines Union Company was claiming the right to them under the contract.

*Further*, it appears that the question of the surplus earnings was threshed out between the Des Moines Union Company and the Milwaukee Company some four or five years prior to the correspondence above quoted.

On December 2, 1898, Mr. Roswell Miller, president of the Milwaukee Company, wrote to Mr. Hubbell the following letter (ex. 418, vol. IV, p. 1765):

"I observe that the contract between the Des Moines Union Railway Company and the Des Moines, Northern & Western Railroad Company is only for 20 years. I think it should be for 50 years. Have you any objections to extending it for so long?"

This was during the negotiations between the Milwaukee and Mr. Hubbell, the result of which was that the Milwaukee acquired all the stock and bonds of the Des Moines Northern & Western Railroad Company preparatory to consolidating the property of the latter company with that of the Milwaukee, and shows that the president of the Milwaukee was familiar with the contract of May 10, 1889, and the ratification contract of July 31, 1897. An examination of defendants' exhibits 420 (vol. IV, p. 1766), 321 (p. 1767), 425, p. 170), 430 (p. 1772), 456 and 457 (p. 1802), 458 and 459 (p. 1803), and 460 (p. 1804) will demonstrate, as we have said, that this whole question of surplus earnings was threshed out in an attempt on the part of the officers of the Chicago, Milwaukee & St. Paul Railway Company to have the contract of May 10, 1889, extended for a period of thirty years. In these negotiations the complainant, the Milwaukee Company, became



thoroughly familiar with the situation with respect to these surplus earnings; with the contract of May 10, 1889, and July 31, 1897, and with the attitude of the respective parties with relation to surplus earnings. These negotiations were abandoned in the latter part of 1899 by reason of the parties being unable to agree upon the terms of the proposed extension. No claim was made in any of these negotiations that the complainants or their predecessors were entitled to these surplus earnings under the existing contracts, but the attitude of the defendant company with respect thereto was acquiesced in.

At a meeting of the stockholders of the Des Moines Union Railway Company held January 4, 1900, at which there were present, among others, C. A. Goodnow and A. J. Earling, officers of the Chicago, Milwaukee & St. Paul Railway Company, each holding one share of stock, and the Chicago, Milwaukee & St. Paul Railway Company by A. J. Earling, president, holding 998 shares of stock, and the Continental Trust Company of New York by F. M. Hubbell, proxy, holding 498 shares of stock (ex. 156, vol. IV, p. 1370), there was presented the report of J. A. Wagner, superintendent, showing the use of the surplus earnings by the Des Moines Union Railway Company in acquiring additional real estate and improvements, and this report was approved upon motion of Mr. Earling.

Again, at a meeting of the stockholders of the Des Moines Union Railway Company held January 5, 1906, at which were present the Chicago, Milwaukee & St. Paul Railway Company holding 998 shares of stock, and E. W. McKenna and W. J. Underwood, officers of the Chicago, Milwaukee & St. Paul Railway Company, each holding one share of stock, and F. A. Delano and

E. B. Pryor, officers of The Wabash Railroad Company, each holding one share of stock (ex. 164, vol. IV, p. 1383), there was presented the report of the superintendent of the Des Moines Union Railway Company for the years 1900, 1901, 1902, 1903, 1904 and 1905, which showed the use of the surplus earnings by the Des Moines Union Railway Company for the purpose of acquiring additional property and improvements, and no objection was made to the appropriation of this fund by the defendant company.

It is interesting to note that when objection was made to the use made of the surplus earnings by the Des Moines Union Railway Company, it was not made by one who had aught to do with any of the contracts, articles of incorporation or amendments thereto, or of any of the dealings of any of the companies with any of these, from 1882 down to 1906, and not until "there arose a new king over Egypt, who knew not Joseph." The first demand for the surplus earnings of petitioners was at a meeting of the directors of the Des Moines Union Company on March 12th, 1906, and the names of those noted as present on behalf of the tenant companies are new names. Dodge, Ashley, How, Hays, Blodgett, Ramsey, Priest and Grover are none of them there (Rec., Vol. II, p. 333 *et seq.* Counsel were present, Vrooman for the Milwaukee and Travons for the Wabash Company and made demand for the earnings in identical terms and this may be said to be the inception of the suit. The demand, presented in writing recites that "the repeated requests heretofore made upon you for the distribution and crediting to the tenant companies of the receipts from real estate rentals, switching charges, etc., having been ignored, etc.," an assertion utterly barren of support in fact.

The original bill was filed February 5th, 1907, and the testimony was closed on the last day of 1912. Here was no haste, but ample time for bringing forward any and all existing testimony. And a record was made during this period of nearly six years which extends to five printed volumes and twenty-one hundred printed pages, and we challenge the production from that record of anything savoring of a demand by the tenant companies of these surplus earnings or of an assertion of a right to them by those companies or any of their predecessors prior to March 12th, 1906. Neither in the oral testimony, nor in the correspondence of the officials of the various companies, nor in the records of the directorate or company meetings is evidence of any such demand to be found.

From 1892 to 1906 these surplus earnings were appropriated as of right by the Des Moines Union Company to its own uses, and the other companies concerned acquiesced in and assented thereto. Specific acts of such appropriation have been cited by us, but no protest appears against any of them. More than fourteen years of accord between the conduct of the parties and the literal terms of the contract of 1889 conclusively shows that the interpretation of the contract according to its very terms is the right one.

We respectfully submit that upon both branches of the case the merits are with the defendants to the original suit, and we pray for a decree accordingly.

**JAMES L. PARRISH and  
FREDERICK W. LEHMANN,**

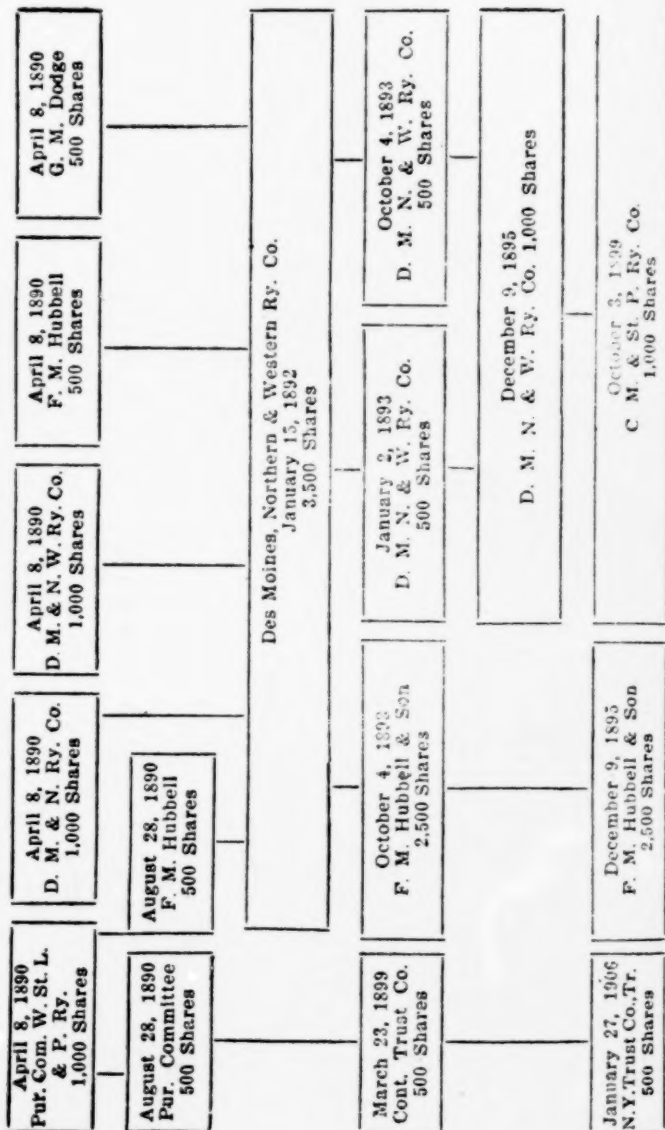
Counsel for the Des Moines  
Union Railway Company,  
M. Hubbell, F. C. Hubbell  
and F. M. Hubbell & Son.



## 1.3—\$50,000



# DIAGRAM SHOWING TRANSFER OF STOCK OF DES MOINES UNION RAILWAY COMPANY



MAR 23 1920

JAMES D. MAHER,  
CLERK.

IN THE  
Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 178

66

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and WABASH  
RAILWAY COMPANY,

Petitioners,

vs.

DES MOINES UNION RAILWAY COMPANY, F. M. HUBBELL *et al.*,  
Respondents.

No. 179

67

DES MOINES UNION RAILWAY COMPANY, F. M. HUBBELL *et al.*,  
Petitioners,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and WABASH  
RAILWAY COMPANY,

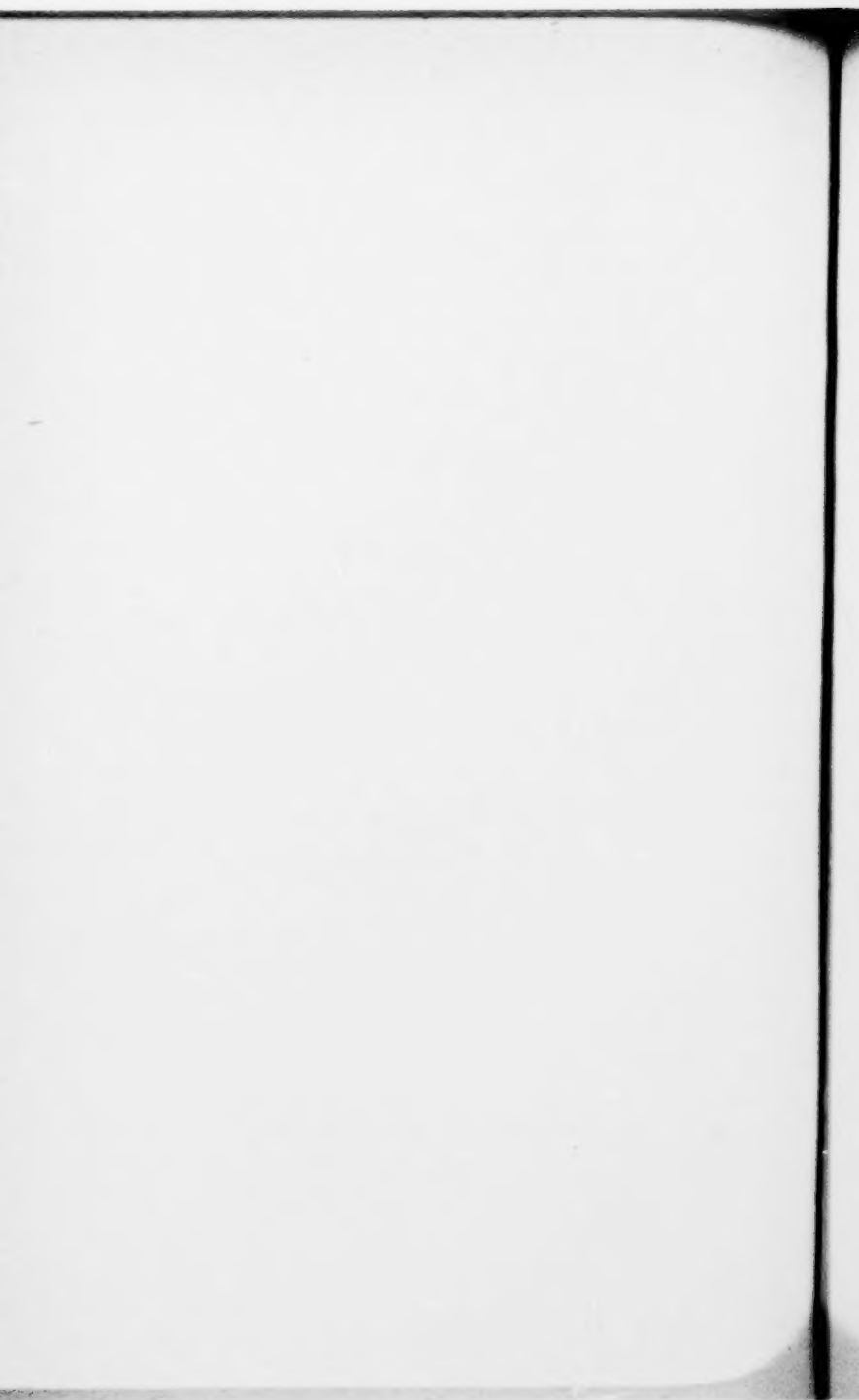
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY AND WABASH RAILWAY COMPANY.

JOHN C. COOK,  
BURTON HANSON,  
Counsel for Chicago, Milwaukee  
& St. Paul Railway Company.

WINSLOW S. PIERCE,  
LAWRENCE GREER,  
ROBERT J. CARY,  
F. C. NICODEMUS, JR.,  
Counsel for Wabash Railway  
Company.





IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1919.

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No. 278.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COM-  
PANY and WABASH RAILWAY COMPANY,  
Petitioners,

*vs.*

DES MOINES UNION RAILWAY COMPANY, F. M. HUB-  
BELL et al.,  
Respondents.

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No. 279.

DES MOINES UNION RAILWAY COMPANY, F. M. HUB-  
BELL et al.,  
Petitioners,

*vs.*

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COM-  
PANY and WABASH RAILWAY COMPANY,  
Respondents.

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On Writs of Certiorari to the United States Circuit  
Court of Appeals for the Eighth Circuit.

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**REPLY BRIEF OF CHICAGO, MILWAUKEE  
& ST. PAUL RAILWAY COMPANY AND  
WABASH RAILWAY COMPANY.**

The brief and argument filed in this cause by  
counsel for the Des Moines Union Railway Com-  
pany and F. M. Hubbell and F. C. Hubbell, is not

responsive in its fundamentals to the brief filed by the complainants. Where reference is made to the argument of the complainants, comment is addressed to quotations, detached from their context, taken from the separate briefs filed by them in the Circuit Court of Appeals.

<sup>1</sup> No attempt has been made to approach the issues upon the theory followed by the majority opinion of the Court of Appeals, or upon the basis of the argument presented by the complainants in the analysis of the facts offered in answer to such theory or of the several points made respecting the same.

Nor do we find in their brief any reference whatsoever to the dissenting opinion of Circuit Judge Hook.

One gathers from a reading of the brief that the conclusions of counsel are based upon the supposition that the trust admittedly created by the contract of January 2, 1882 was abandoned because of the incorporation of the Des Moines Company, and of the conveyance to such Company of the various terminal properties acquired by the temporary trustees.

In this respect counsel have not attempted to reply to the reasons presented in the brief of the complainants showing that the incorporation of the Des Moines Company, the several resolutions of its stockholders and directors, the resolutions of the proprietary companies and the deeds of conveyance, made to the Des Moines Company as a result thereof, were a development in corporate form of the trust created by the parties to the contract of January 2, 1882.

The brief is based wholly upon the supposition that the trust created by the contract of January

2, 1882 would necessarily be destroyed because of the several conveyances in fee simple to the Des Moines Company of the terminal properties, the titles to which were assembled in the names of the temporary trustees.

All subsequent discussion is based upon this supposition.

For instance, the analysis of the Amendments to the Articles of the Des Moines Company proceeds on the stated theory that they represent the thought that it was intended that the defendant company theretofore acquired absolute title to the terminal properties, and that thus such amendments are corroborative thereof.

In view of such a situation, it is submitted that it would serve no useful purpose in clarifying argument to review in detail the several points attempted to be made by counsel for the Hubbells. It is submitted that they have all been anticipated and adequately answered in the original brief filed on behalf of the complainants, and that therefore this reply can be made responsive in the best sense by analyzing a case recently decided by this Court, showing that counsel for the Hubbells have wholly misconceived the true principles governing the issues involved.

In the case of *Chicago, Milwaukee and St. Paul Railway Company vs. Minneapolis Civic and Commercial Association*, 247 U. S. 490 this Court determined the status of the parties in the instant case upon a set of facts so coincident in fundamentals and detail with the facts now before the Court that the opinion there rendered could be applied without substantial alteration as decisive of the case at bar.

This Court in an opinion written by Mr. Justice Clarke delivered June 10, 1918, subsequent

to the decision of the Circuit Court of Appeals in this case held that the Minneapolis Eastern Railway Company, a Company developed in the interest of two trunk lines entering Minneapolis, which jointly owned its capital stock, was not an independent corporation and had no power to publish tariffs covering service over its lines which the proprietary companies themselves might render.

Although the decision is fresh in the minds of the Court, a brief restatement of the facts will emphasize its coincidence with the case at bar.

The Minneapolis Eastern Railway Company, referred to herein as the Eastern Company, was organized under the laws of Minnesota as a railway company to construct and operate a railway from Minneapolis to St. Paul. It was organized as an independent corporation by a group of mill owners, and, unlike the Des Moines Company, it was not organized by, or in the interest of, or to take title to properties owned by the other railway companies which became its proprietors.

After the organization of the Eastern Company had been completed, but before any right of way had been acquired or any construction work done, the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company, referred to herein collectively as the proprietary companies

“came into exclusive control of the corporation and a board of directors satisfactory to them was elected, with the result that the only road which the company ever built or operated (omitting small fractions) was one mile of main track and one mile and a half of yard track and sidings in the City of Minneapolis” (p. 494).

Although the Eastern Company, like the Des Moines Company, was incorporated as a railroad company, and not as a terminal company, it became in point of fact the corporate instrumentality of the proprietary companies whereby, to avoid duplicating terminal facilities in a congested district, they were enabled

"to construct and operate but one track to the group of industries to be served, instead of each building and maintaining its own track, and to construct and use that track in common so that each might have the benefit of it as fully as if it were the sole owner" (p. 500).

There is here to be noted a significant point of difference in the facts of the two cases:

The Des Moines Company was organized for the sole purpose of holding legal title to the facilities in Des Moines to be used in common by the railway companies which became the owners of its stock, and this purpose was declared in the definite provisions of the contract of January 2, 1882, which was embodied in its Articles of Incorporation as the statute law of its existence. No such declaration of purpose was made by the Eastern Company either at the time of its incorporation or subsequently, but this Court nevertheless found as a fact that such was the purpose for which it was originally acquired and afterwards utilized by the proprietary companies; and made this finding by reason of a series of acts and circumstances which, curious as it may seem, are strikingly like those which the Circuit Court of Appeals held in the case at bar, effected an unintended and unexpected destruction of the proprietary interests of the present complainants or their predecessors in the properties held by the Des Moines Company.

We quote further from this Court's opinion:

"Almost immediately after the organization of the Eastern Company, the three companies entered into a written contract, effective for over 39 years, until May 1, 1918, which is of much significance in determining the decisive fact in the case, as we have stated it.

"This contract provides:

(1) That only 300 shares of the authorized 10,000 shares of capital stock of the Eastern Company shall be issued, and of these, 75 shares each must be issued to the Omaha and Milwaukee Companies, 145 shares to a trustee for the Eastern Company, and the remaining 5 shares shall be issued as qualifying shares to directors. The 145 trust shares 'shall not be transferable except by the written consent of all (3) said parties hereto, and any transfer thereof without such consent shall be void and of no force or effect.'

(2) The Eastern Company shall execute in proper form 150 bonds of \$1,000 each and a mortgage on all the property and franchises of the company to secure their payment. The Milwaukee and Omaha Companies agree each to purchase, at 80% of their par value, one-half the amount of such of these bonds as it may be necessary to issue to pay for the right of way, construction and equipment of the railroad;

(3) That the Milwaukee and Omaha Companies shall have 'equal and the same rights in and to the said railway . . . in all respects;' that they shall pay the same charge for switching their respective cars by said railway, and that no partiality or favor shall be shown to either;

(4) That the superintendent having charge of the operation of the railroad, shall be appointed 'by the consent and mutual agreement of all the parties to these presents;'

(5) That the Eastern Company shall

charge all parties one dollar for switching each loaded car, but a rebate of fifty per cent. of this charge shall be made to the Milwaukee and Omaha Companies;

(6) If any other company having equal facilities with the Eastern Company for reaching mills in Minneapolis shall promptly and satisfactorily do the switching for the second and third parties (the Milwaukee and Omaha companies) then the Eastern Company with the written consent of the Omaha and Milwaukee Companies, will do switching for such railroad companies over the said railroad of the Eastern Company on the same terms that switching is done for the said second and third parties (the Milwaukee and Omaha Companies) over such railroad but without rebate to any company" (pp. 495-496).

The agreement here summarized is so similar in its basic aspects as well as in detail to the supplemental agreement of May 10, 1889, between Des Moines Company and its proprietors, as strongly to suggest that it may have been utilized as a model by the draftsman of the latter instrument.

Like the supplemental agreement of May 10, 1889, it provided for the issue of the stock of the company in quarters, each quarter representing or evidencing a proprietorship equivalent to an equitable tenancy in common, one of these quarters being allotted to each of the proprietary companies and the surplus quarters being issued to a "trustee for the Eastern Company." The nature of the trust is not disclosed, but it is not improbable that the parties intended that the surplus quarters might be sold to other trunk line companies desiring to use the facilities of the Eastern Company, as in the instant case was provided in

section twenty-four of the supplemental Agreement of May 10, 1889.

Provision was also made for the control and operation of the properties of the Eastern Company by representatives of the two proprietary companies, the stipulations in this respect being substantially the same as those provided in sections eleven, twelve and thirteen of the Supplemental Agreement of May 10, 1889.

Summarizing the effect of the above mentioned provisions of the Agreement, this Court said:

"It deprived the Board of the power: to issue the capital stock of the company and to finance its affairs; to select a superintendent to operate the company's two and one-half miles of track, by requiring that such selection be made only with the consent and mutual agreement of the three companies; to make mutual agreements for the interchange of business with any other company except with the mutual consent of the Milwaukee and Omaha Companies; and it renders one-half (save five shares) of the stock which it permits to be issued, transferable only with the written consent of the Milwaukee and Omaha Companies. Thus, the making of this contract was an obvious surrender by the Eastern Company of substantially all freedom of corporate action and an assumption of control over that company by the Milwaukee and Omaha Companies, which converted it largely into a mere agency or instrumentality for doing their bidding" (pp. 496-497).

It will be recalled that the Des Moines Company was repeatedly declared by the Hubbells to be precisely such an agency or instrumentality in the reports made year after year under oath to the taxing authorities of the State of Iowa, which re-



ports were made subsequent to every transaction which they now claim was destructive of the trust.

This Court then recites certain acts of administrative control exercised thereafter by the proprietary companies, among these being the division of an accumulated surplus of \$95,000 equally between the two proprietary companies in the form of a stock dividend, the purchase by the proprietary companies in equal proportions of certain refunding bonds issued by the Eastern Company, and submits the following conclusion:

"With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is and it is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern Company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it and therefore free to impose separate carrying charges upon the public" (p. 498).

Without underestimating the difficulty of conceiving as an original proposition a plan of joint control more complete and effective than the plan above outlined, credit for such an accomplishment is due the organizers of the Des Moines Company for the following reasons, among many others:

(a) The Des Moines Company was created without corporate power or capacity to take title to the terminal properties in Des Moines, except upon a trust to hold the same in perpetuity "subject to the joint use and occupation of" the proprietary companies, for its Articles of Incorporation are premised upon the terms of the contract of January 2, 1882, which is recited in the same in full as a preamble, and it is further provided that all powers

exercised by such Company shall be in accordance with the terms and the spirit of the aforesaid contract.

There was no such limitation upon the corporate power of the Eastern Company.

(b) The original Articles of Incorporation of the Des Moines Company vested the management of the affairs of the Company in a Board of eight Directors, all of whom were to be nominated by the proprietary companies, or any grantees or assignees of either of them, and the Board of Directors was not permitted to make any contract, lease, or other agreement amounting to a permanent charge on the property of the Des Moines Company without the approval of the three proprietary companies or their assignees, and without further approval of the holders of more than three-fourths of the stock of the Des Moines Company.

There was no such limitation upon the power and authority of the stockholders and Board of Directors of the Eastern Company.

(c) Substantially all of the provisions of the tripartite agreement between the Eastern Company and its proprietary companies which are summarized in the extracts from the opinion of this Court quoted above are embodied in the Supplemental Agreement of May 10, 1889, between the Des Moines Company and its proprietors, and there are super-added thereto further and more stringent provisions evidencing the identity of the stock interest and property interest of the proprietary companies, among these being (1) the provision requiring the stock of the Des Moines Company to be issued in quarters represented by single certificates, *all* of which were to be non-transferable, without the unanimous consent of the proprietary companies; (2) the provision admitting a railway company becoming the purchaser of a surplus quarter interest in the stock of the company to the use and occupation of the terminal

properties of the Des Moines Company on a parity with the three original proprietors; and (3) the provision that in case any difference should arise between the parties respecting any matter *not* expressly provided for in the Agreement, the same should be referred to a board of arbitration to be determined not upon the basis of the legal rights of the Des Moines Company, as the holder of the legal title to the terminal properties, but upon principles of justice and equity.

Following the enumeration of the facts which, in its opinion, establish the character of the Eastern Company as the mere corporate agency or representative of the two proprietary companies, facts which manifestly fall far short of the facts disclosed in the case at bar, this Court further says:

"To accomplish this end they resorted to the familiar device of incorporating the Eastern Company, and in order that their purpose might not be defeated in the future, by the design or business necessity of either company, the contract between them which we have discussed, was entered into to prevent the corporate organization of the Eastern Company and the control of its operations from being changed by either owning company without the consent of the other, and the evidence makes it very clear that all through its corporate life the Eastern organization has been consistently used as a mere agency of the two owning companies to accomplish their original purpose.

"Much emphasis is laid upon statements made in various decisions of this Court that ownership, alone, of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies, or render the stockholding company

the owner of the property of the other, or create the relation of principal and agent or representative between the two. *Pullman's Palace Car Co. v. Missouri Pacific Ry. Co.*, 115 U. S. 587; *Peterson v. Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364, 391; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 413; *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 108; and *United States v. Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516, 529, 530, and it is argued that since the order of the Commission requires that the tracks, the title to which is in the Eastern Company, be treated as the property of the stock owning companies, the effect of it, if enforced, will be to deprive the Eastern Company of its property without compensation and to render valueless its capital stock owned by the Milwaukee and Omaha Companies.

"While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency of instrumentality of the owning company or companies. *United States v. Lehigh Valley R. R. Co.*, 220 U. S., 257, 273, and *United States v. Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516. In such a case the courts will not permit themselves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.

"Satisfied as we are by the evidence that the Eastern Company is a completely controlled agency of the two companies which

own its capital stock, we agree with the Supreme Court of Minnesota that the fact that the legal title to what are obviously terminal or spur delivery tracks is in the Eastern Company should not be permitted to become the warrant for permitting a charge upon shippers greater than they would be required to pay if that title were in the owning companies" (pp. 500-501).

From the foregoing it is quite clear that this decision must control the case at bar, unless it is distinguishable by reason of the fact that at the time the decision was rendered the whole capital stock of the Eastern Company was held apparently in equal proportions by the proprietary companies, whereas in the case at bar a part of the capital stock of the Des Moines Company is now claimed to be owned by the defendants Hubbell.

To urge such a distinction is to ignore the underlying principle of this Court's decision.

This Court held that the Eastern Company was organized and established by the two proprietary companies as a convenient and customary means of creating a tenancy in common in the railway property held in legal title by the Eastern Company "so that each might have the benefit of it as fully as if it were the sole owner."

The proprietary interest was represented by shares of stock of the Eastern Company issued to the proprietary companies, and at the date of this Court's decision the tripartite agreement between the Eastern Company and the proprietary companies had expired and the sole evidence or indicia of their title to and right to use and enjoy the common property was the certificates of capital stock of the Eastern Company. In other words, this Court disregarded the conventional status of the shares and held that in the

possession of the proprietary companies such shares represented a right to the common use and enjoyment of the properties held by the Eastern Company precisely as if that right had been definitely expressed upon the face of the stock certificates themselves.

The Des Moines Company was organized under substantially the same conditions as the Eastern Company and for the same purpose, and its capital stock was allotted to the proprietary companies for the same purpose as the stock of the Eastern Company was allotted to its proprietary companies, and, curiously enough, in the same identical proportions.

It is true that at a subsequent date certain shares of the Des Moines Company passed from the control of the proprietary companies into the hands of the defendant Hubbell, but this was not intended to destroy, and, in the nature of things, could not destroy the right of user or the equitable estates inhering in and represented by the shares retained by the proprietary companies for the reason—if for no other reason—that the parties themselves expressly so stipulated.

At the time the Purchasing Committee sold three one-eighth interests to the defendant Hubbell, retaining one-eighth in its own treasury, it was expressly agreed, as we have repeatedly pointed out in our original brief, "that a one-eighth interest in the capital stock should be sufficient to represent a proprietorship in the company" (Rec., 1603).

Moreover, even if there had been no express agreement of this character, the Court, in order to sustain the transaction, would be obliged to imply one. It is quite evident that the Milwaukee Company and Omaha Company could not now de-

feat the deliberate judgment of this Court by the simple device of selling to an individual, much less an individual who is an officer and director of the Eastern Company, a portion of their stock of the Eastern Company. If such a transaction were presented surely this Court would hold that the Milwaukee Company and the Omaha Company had no corporate power to alienate their interest in the corporate property of the Eastern Company by a transfer of their shares of stock of the Eastern Company, thereby disabling themselves in the performance of their public duties and in the exercise of their corporate franchises. Such a transaction if not held void would be construed as implying a reservation in the Omaha Company and the Milwaukee Company of every right of user represented by their original allotments of stock.

Certainly there is no substantial reason why an eighth stock interest in the Des Moines Company should not be given the same attributes as a one-quarter or a one-half stock interest in the Eastern Company—especially as the record in this case makes it abundantly clear that all of the parties so intended.

To argue further that the parties always intended that an allotment of stock in the Des Moines Company, originally an allotment of one-quarter and subsequently an allotment of one-eighth, should represent a proprietorship, is surely unnecessary. The evidence on this point is overwhelming.

In this connection, we desire, however, to refer again to the provisions of the Articles of Incorporation of the Des Moines Company attempted to be amended at the illegal stockholder's meeting of April 8, 1890.

Article IV provides that

"At all future elections of directors it shall require the votes of more than seven-eighths of all the stock theretofore issued to elect any director."

The same Article provides that

"With respect to the matters above mentioned, and all other matters, except the ordinary operation of the property, the Board of Directors can act only upon the unanimous vote of eight members thereof."

And Article IX provides that the Articles may only be amended by a vote of "more than seven-eighths of all the stock in favor thereof."

These provisions give a veto, amounting to a power of strangulation, to a vote of one-eighth of the stock of the Des Moines Company.

What conceivable reason could there be for giving to an eighth stock interest a veto power of this character in perpetuity, unless it be given as supplementary to or complementary of a proprietorship of which the primary attribute is a right to use and occupy the terminal facilities of the Des Moines Company in common with other proprietary companies as contemplated and provided for by the express provisions of the contract of January 2, 1882.

The theory upon which counsel for the defendants have developed their brief, namely, that there is great significance in the fact that the temporary trustees conveyed to the Des Moines Company titles in fee simple to the properties assembled for the proprietary Companies under the trust instrument of January 2, 1882, with the supposed result that such absolute conveyances were incon-



sistent with the establishment and continuance of a trust in the Des Moines Company, is cast in a series of questions beginning on page 264 of their brief, relating to subject matters upon which it is suggested that counsel for the complainants have been silent.

It is submitted that the queries raised by such questions have been fully disposed of, in our original brief, under Points I, II, V and VI, discussing the plan of the trust created, the reasons for the conveyance of complete legal titles in the trust properties to the Des Moines Company, and the harmonious relationship of the subsequent acts and circumstances to the trust thus created and developed.

Nevertheless, at the risk of repetition, we desire to answer categorically the questions thus submitted:

Question (1). "If the organization of the defendant company was for the sole purpose of providing the corporate trustee referred to in the contract of 1882, as claimed on pages 99-100 of their argument, why did they organize a corporation having the power and assuming the obligation of a Railway Company and why did they organize a corporation for pecuniary profit?"

Previous to the making of the contract of January 2, 1882, the terminal properties acquired in the common interest of the three proprietary companies were held in the names of two corporations and two individuals. These properties were intended to be used for railroad purposes. It was, therefore, essential that they be concentrated in a railroad corporation having power to exercise all the prerogatives and to perform all of the functions of a common carrier, to the end that the

proprietary companies might effectively enjoy for railroad purposes the properties acquired and held for their common benefit. Furthermore, it was essential that these properties be conveyed to a single railroad corporation, to make practicable the mortgaging of the same and the issuing of bonds, in compliance with the terms of the trust instrument. An identical course was pursued by the organizers of the Eastern Company in the case of *Chicago, Milwaukee and St. Paul Railway Company v. Minneapolis Civic and Commercial Association*, above analyzed.

A railway corporation for pecuniary profit was organized because no other corporate form of railway company was possible under the laws of Iowa and, furthermore, because under paragraph Tenth of the trust instrument (Rec., p. 413) it was provided that railroad companies other than the proprietary companies might be entitled to the use of all of said terminal facilities upon the payment of a fair sum for rental and (their) its proportion of the maintenance account."

Question (2a). "If it was the purpose to transfer to the defendant Company simply the legal title to the Terminal property then why the following:

Why did the Des Moines Northwestern Railway Company, in whose name the title to no part of the Terminal stood, in January, 1895, (1885) pass a resolution authorizing its officers to transfer to the Terminal Company all of its interests in the Terminal Company of whatever kind and character?"

In vesting the trust properties in a corporate trustee, as provided for by the trust instrument, it was appropriate that the proprietary companies should as they did do on January 1, 1885, take

coincident corporate action with this end in view. In this respect, the resolutions adopted by the stockholders of the Northwestern Company, on January 1, 1885, were identical with the resolutions passed by the St. Louis and Northern Companies on the same date. By these several resolutions, each proprietary company in unequivocal terms accepted the incorporation of the Des Moines Company as the corporate trustee provided for by trust instrument, and it was appropriate that concerted action be taken by the proprietary companies to vest in such corporate trustee the trust properties assembled in the names of the temporary trustees. Thus, in a determination of the character of estate intended to be conveyed by the proprietary companies to the Des Moines Company, it is without significance that the stockholders of the Northwestern Company adopted the above resolution, notwithstanding, that it had taken title to no part of the trust properties. *On the other hand, the fact that the Northwestern Company did not, as both shown and asserted by counsel for the Hubbells on pages 67 and 70 of their brief, make any deed of conveyance of any kind or character to the Des Moines Company is highly significant in demonstrating that the proprietary companies did not intend to convey their equitable estates in common to the Des Moines Company, for as this Court has said in Brown v. Fletcher, 235 U. S. 589, an equitable estate is an estate in property to the same extent as if the legal title thereto were vested in the beneficiary and such an estate passes by deed. It is beyond question, as counsel for the Hubbells themselves state, that the proprietary companies had equitable estates in common in the terminal properties, while the*

temporary trustees held legal title thereto. Therefore, if it had been the intent of the proprietary companies that such equitable estates should pass with the legal estates in the terminal properties to the Des Moines Company, the Northwestern Company could have divested itself of its own interests in this respect only by proper deed of conveyance.

Question (2b). "Why did the Northwestern Company, the Northern Company and the St. Louis Company, each, in their resolutions of January, 1885, authorizing their officers to convey this property, use this language: 'convey, assign and transfer to said company all its right, title and interest of whatever name and character in and to the real estate, franchises, choses in action, and rights in possession or contingent to all the property in the City of Des Moines east of Farnham Street in said City now held, enjoyed or claimed by either or all of the signatories of said contract of January 2nd, 1882, or any agent or trustee thereof purchased, acquired, or held in pursuance of said contract.' (Rec., Vol. II, p. 427.)"

The proprietary companies established their trust by virtue of the contract of January 2, 1882. The Des Moines Company became the corporate trustee provided for in this contract, both by express declaration of the incorporators and by virtue of the recital of the trust instrument in the Articles of Incorporation and the declaration contained in Article 2 that "all the powers exercised by this Company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882." The Des Moines Company in its resolution of January 1, 1885, accepted the trust and directed

its officers to procure the necessary conveyances and transfers to fully invest it with *the title* provided for in the trust instrument. For the purpose of carrying out the terms of the trust as expressly provided by the trust instrument, it was essential that the corporate trustee take legal title to the trust properties in fee simple. The trust estates thus being established and reserved by instruments other than the deeds of conveyance made by the temporary trustees, it was both appropriate and essential that the conveyances made by them should be without reservation.

Question (2c). "Why did Col. Blodgett, whose integrity and ability are unchallenged, who had lived these transactions and who knew the intention better than can counsel or the Court, in preparing the deed of the St. Louis Company in carrying out these resolutions, prepare a warranty deed, and why did he formulate it so as to convey not only the property which stood in the name of that Company but also 'all of the real estate within the City of Des Moines \* \* \* also all its embankments, bridges, sidetracks, \* \* \* all its railroad property acquired or to be acquired and everything appurtenant to said railroad'?" (p. 458)

The answer to this is covered by our answer to Questions (2a) and (2b), and we may also add that Col. Blodgett, precisely because he was a lawyer of unchallenged ability, prepared the deed of the St. Louis Company in the form stated in the question, knowing that the warranty deed was not to be the instrument within which the trust was to be reserved.

Counsel for the Hubbells, failing to appreciate the significance of the principle here involved,

assert that the embodiment of the trust instrument in the Articles of Incorporation was a "mere solecism" and an "incongruity" (Brief, p. 191).

From their standpoint this is indeed true; and their own admission that their whole argument is utterly inconsistent with the existence of these reservations in the organic law of the Des Moines Company is the best possible demonstration of the complete fallacy of their fundamental contention.

Question (2d). "Why did the Northern Company in its deed after describing the property which stood in his name use the following language:

"Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest in the above described property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in or to the above described premises, etc.?" (p. 456).

The answer to this is covered by our answer to Questions (2a) and (2b).

Question (2c). "Why was it provided in the original articles of incorporation of the defendant Company that its capital stock should be issued in payment for the Terminal property?"

It was for the reason that it was contemplated that the stock would be apportioned among the proprietary companies as evidencing and measuring their respective equitable estates in the com-

mon properties, precisely as was done with the stock of the Eastern Company in the case of *Chicago, Milwaukee and St. Paul Company v. Minneapolis Civic and Commercial Association, supra*.

Question (2f). "Why was it recited in the contract of May 10th, 1889, that the defendant Company owned this property?"

The primary purpose of this agreement was to give assurance to the holders of the bonds issued under the mortgage of the Des Moines Company that the interest on such bonds would be duly and punctually paid by the proprietary companies, and this agreement was formulated and executed primarily as an additional security for the bonds issued under the mortgage, which mortgage also recited that the Des Moines Company was the owner of the terminal properties. Moreover, Judge Hook, in his dissenting opinion calls attention to the fact that such recital of ownership is based upon the provisions of the charter of the corporation and that in such charter is incorporated the trust instrument.

Question (3). "If the contract of May 10th, 1889, was supplemental to the contract of January 2, 1882, why does it not recite this fact?"

This fact is recited in the resolution authorizing this supplemental agreement and a further recitation of the fact was unnecessary, especially in view of the fact that the agreement is fundamentally a supplemental agreement, in that it only provides for the details of operation of the terminals for the period of thirty years, whereas, the contract of January 2, 1882, is perpetual. In connection with this subject matter, we wish to refer

to the assertion in the brief of counsel that we have misquoted the resolution authorizing the supplemental agreement by stating that it provided for a thirty year agreement, whereas, the record in fact shows that the resolution provided for an agreement not for *thirty years* but for *three years*. (Brief, pp. 266-268.) It is true that the record is as stated by counsel for the Hubbells, but it obviously contains in this respect a typographical error which has been treated as such from the inception of this litigation, and no suggestion was ever made in oral argument or printed argument, of which we are aware, that the fact was otherwise.

In concluding our reply argument we especially direct this Court's attention to that division of the brief of counsel for the Hubbells (pp. 258, 259) where they defend their alleged title to the five-eighths stock interest in the Des Moines Company which they took from the treasury of the consolidated company under the several transactions analyzed in Point VII of our original brief.

Their defense of these transactions is not even a plea in confession and avoidance; it is indeed a plea of guilty.

The statement that the mortgage debt to the Metropolitan Trust Company through whom the St. Paul Company claims title has long since been paid is not true. The record shows that the mortgage to the Metropolitan Trust Company was duly foreclosed, that the bondholders themselves were forced to buy in the property and that there was a substantial deficiency which ought to have been satisfied by application of the unmortgaged assets wrongfully appropriated by the Hubbells (Rec., 651).



The Hubbells are, however, mistaken in assuming that the security holders of the defunct consolidated company are alone entitled to complain of the breach of trust. As we pointed out in our original brief (Points VI and VII), the consolidated company as one of the equitable tenants in common was itself subject to all the disabilities of a fiduciary in dealing with aliquot interests in the trust properties and the defendants Hubbell stand in no better position than their controlled vendor.

The Hubbells do not attempt to controvert this proposition, and we submit that it is incontrovertible.

To emphasize and illustrate the application of this proposition we refer again to the case of *Chicago, Milwaukee and St. Paul Railway Company v. Minneapolis Civic and Commercial Association, supra*.

Let it be assumed that an individual who was an officer and director of the Eastern Company and also a director of one or both of the proprietary companies by a series of transactions that were fraudulent *per se* and confessedly in violation of the express provisions of the tripartite agreement had obtained possession of the 145 shares (the two surplus quarters) of the stock of the Eastern Company which under the terms of the tripartite agreement had been issued to "a trustee for the Eastern Company" and let it be further assumed that this individual should assert that his possession and alleged ownership of these shares established the autonomy and independence of the Eastern Company so that it was free to do what this Court held that it could not do in the case in question. Would any lawyer seriously

contend that the two proprietary companies, upon a discovery of the fraudulent character and object of the transaction, would not be entitled to a rescission of the transaction and a restoration of the *status quo ante*?

The fact that such relief in the instant case will deprive the Hubbells of any legitimate profit which they might still realize by transferring the shares to other railway companies is of no consequence. Equity is indifferent to the ill-fortunes of a faithless fiduciary. As the Hubbells, lured by the hope and expectation of inordinate gain, elected to ignore the requirements of conscience and good faith and set about deliberately to destroy property interests of immense value belonging to their *cestuis que trustent*, surely they will not be heard to complain if at the end of a long, tedious and costly litigation a court of equity should give the injured *cestuis* their full and complete measure of equitable relief.

Finally attention should be called to the fact that such complete measure of relief cannot be given the complainants with the continuance in the Hubbells of the five-eighths stockholding interest in the Des Moines Company now claimed to be owned by them, for any decree which protects the right of user belonging to the complainants as equitable tenants in common of the terminal properties and still leaves the Hubbells identified with, or in control of, the corporate activities of the Des Moines Company without responsibility in this respect either to the public or to the complainants, and with power to exploit such control in furtherance of the private real estate operations of F. M. Hubbell and Son in the industrial precincts of the City of Des Moines, would both perpetuate

a situation in principle indefensible and create paralysis in the legitimate development of the trust enterprise and in the performance by the proprietary companies through it of their duties to the public.

The brief and argument of counsel for the Hubbells upon the controversy as to the so-called surplus earnings, is equally as unresponsive as their argument on the main case. We have nothing to add to the argument in our original brief on this controversy, except to reiterate our belief that it involves no public interest and no rule or principle of law which public interest requires this Court to determine, and that the writ of *certiorari* issued on petition of the Hubbells may properly be dismissed.

In the brief of counsel for the Hubbells (p. 269), they question the statement in our original brief that these accumulations now amount to approximately \$2,000,000.00, and say:

“There is nothing in the record to sustain this statement and it is not true as a matter of fact. The record does show that a substantial sum involved in this issue.”

As we stated in our original brief, the record does not show the amount of these accumulations at the present time, the testimony having been taken a number of years ago.

It seems proper, however, that this Court should be apprised of the precise condition of the case at the time of the argument, relying in this

respect upon the good faith of counsel. The fact is that on December 31, 1917, these accumulations, as reported by joint accountants employed to audit the books of the Des Moines Company, amounted to \$1,730,582.58. The subsequent accretions, including interest on the fund, practically all of which is in cash, should bring the present total to a figure well above \$2,000,000.00.

**All of which is respectfully submitted.**

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